Searching for Justice

An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The Honourable
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Searching for Justice An Independent Review of Nova Scotia's
Response to Reports of Institutional Abuse - Executive Summary and Recommendations

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Executive Summary and Recommendations

Abuse is a terrible thing. It forever alters its victims, particularly when they are children. And even more so where the victims are in the care of their abusers.

It follows that those who abuse children while in their care should be rooted out.

But not at the expense of basic fairness to all concerned.

Reports of abuse at Nova Scotia's youth facilities caused the Government to adopt a response. Central to the response was a Compensation Program for those said to have been abused.

The Program was seriously flawed. So flawed that it has left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, employees who have been branded as abusers without appropriate recourse, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia.

This Report cannot begin to separate out the true and false claims of abuse. One of the byproducts of a flawed Government response has been to now make that determination (in the vast majority of cases) impossible. But this Report can document how the Government's response, however well-intentioned, failed to meet the needs of its citizens, was fundamentally unfair to some of the Province's current and past employees, and did a disservice to true victims of abuse. As one former employee put it to me, "The road to hell is paved with good intentions."

THE MANDATE

On November 26, 1999, the Honourable Fred Kaufman, C.M., Q.C., was appointed by the Government of Nova Scotia to conduct an independent review of the Government response to reports of institutional abuse in Nova Scotia. His mandate was defined as follows:

> In October 1994 Government responded to reports of physical and sexual abuse by provincial employees against former residents of provincially operated institutions with a three-pronged strategy: an investigation of the alleged abuse; an assessment of the safety of youth currently in custody; and a Compensation Program.
>
> Subsequent to his review of the nature and extent of institutional abuse, former New Brunswick Chief Justice Stuart Stratton recommended the establishment of an alternative dispute resolution process for responding to alleged victims of institutional abuse. The Compensation Program came into effect June 17, 1996.
>
> The Program has been adjusted twice since its inception.
>
> The Department of Justice established an Internal Investigation Unit to investigate the allegations of abuse against current employees for disciplinary purposes. The RCMP established Operation Hope to handle the criminal investigation of alleged perpetrators.
>
> The Program has been criticized by current and former employees who feel that their reputations have been tarnished; by claimants who believe changes made to the Program are too restrictive; and by citizens concerned about the cost and other aspects of the Program.
>
> In response to these criticisms, Government committed to review the Compensation Program for Victims of Institutional Abuse "to ensure the process is fair and upholds the rights of both the victims and the accused".
>
> *Terms of Reference:*
>
> The independent review will determine if the Government response to institutional abuse has been appropriate, fair and reasonable. The review will:
>
> - document and describe the Governmental response to the allegations of institutional abuse;
> - assess the appropriateness of the Government response in light of:
>
>   the contemporary context and the public interest;

the interests of claimants, staff and former staff of the institutions;
other available response options; and

- assess the implementation of each element of the Government response.

A report of the review findings will be made to the Minister of Justice and subsequently released to the public.

Activities undertaken during the review must not compromise any police investigation being conducted in relation to the alleged institutional abuse.

LIMITATIONS OF MANDATE

Mr. Kaufman was to conduct a *review,* not a *public inquiry.* This means, for example, that there is no opportunity for interested parties to test, through cross-examination, the accuracy or veracity of statements made by other parties. Given this limitation and others, it is obvious that neither findings of credibility nor disputed findings of misconduct can fairly be made against anyone.

The law is also clear that, whether Mr. Kaufman was conducting a review or a public inquiry, he was precluded from finding criminal or civil responsibility. This means, for example, that he was prohibited from determining whether or not any specific allegation of abuse (or conversely, any specific allegation of public mischief or fraud made against a claimant seeking or obtaining compensation) is well-founded.

USE OF TERMINOLOGY

Former and present employees of institutions where abuse has been alleged have been described in various documents and media accounts as "the accused" or as "the abusers." Apart from references to employees who were formally charged or convicted in criminal proceedings, the Report avoids describing any employees in this way.

Former residents of institutions where abuse has been reported have been described in various documents and media accounts as "victims," "claimants," "complainants" or "survivors." Individuals who have been physically or sexually abused are entitled to be described in a way that shows sensitivity to their ordeal. Indeed, the literature reflects that the use of the term "victim" to describe these individuals creates the danger that they will be defined by their victimization, rather than by their affirmative steps to overcome their ordeals. Accordingly, the term "survivor" has been utilized in the literature to sensitively describe them. However, where, as is the case here, issues remain as to who was truly subjected to abuse and by whom, and where allegations of abuse and of public mischief are the subject of current investigations, the most sensitive and least presumptuous way to describe these individuals is as "claimants," unless the context otherwise requires.

THE PROCESS

This review had both factual and analytical components. A description of the Government response to reports of institutional abuse may be regarded as the factual component of the review. This required Mr. Kaufman and his staff to exhaustively review documentation from a variety of sources and question over 100 individuals who had knowledge of various elements of the Government response or who were affected by it.

There were 1,246 claim files processed in the Compensation Program. Mr. Kaufman's staff also randomly examined 90 of those claim files, to facilitate his understanding of how the Program worked on a day-to-day basis through the various periods of its existence. Additional claimant files were examined as issues arose during the interview process. In reviewing these and other files, steps were taken to maintain the confidentiality of both claimants and employees mentioned in those files.

The factual component of the review included an examination of the impact that the Government response had upon those who were affected by it – particularly the claimants and the employees. To understand this impact, Mr. Kaufman personally met with a number of claimants and employees. This impact is fully described in Chapter XIII of the Report.

The second component of this review was to *evaluate* whether the Government response was fair, appropriate and reasonable and make recommendations for the future. This may be characterized as the analytical (and systemic) component of the review. It represents its most important function.

To this end, Mr. Kaufman's staff also accumulated materials from various jurisdictions that address how reports of institutional abuse have been or should be addressed by governments. These include law commission reports, studies, discussion papers, alternative programs, models, articles, and internal evaluations of existing programs. Interviews of individuals involved in the design or implementation of alternative programs elsewhere in Canada were also conducted.

Once a number of interviews were conducted and voluminous documentation reviewed, written and oral submissions were provided to Mr. Kaufman on behalf of claimants, past and present employees, the Nova Scotia Government Employees' Union ("NSGEU") and the Department of Justice.

STRUCTURE OF THE REPORT

Chapter I is designed to introduce the reader to the scope and nature of Mr. Kaufman's mandate. Chapter II provides a historical overview of the institutions where abuse was alleged. Prior to the Government's response commencing in 1994, allegations of abuse at these institutions had already surfaced and, indeed, been the subject of police investigations and court proceedings. A brief history of these proceedings prior to 1994 is also contained in this chapter.

Chapters III to XII describe the Government response to reports of institutional abuse from its early formulation to the various modifications throughout.

The impact of the Government response on both claimants and employees and their families is discussed in Chapter XIII. Ultimately, negotiations between the NSGEU and Government led to a Memorandum of Agreement defining options available to certain employees against whom abuse allegations had been made. This Memorandum of Agreement is addressed in Chapter XIV.

The Internal Investigations Unit ("IIU") was formed to investigate allegations made against current employees for disciplinary purposes. Its role was later expanded. A report was prepared by the IIU (the Chambers-Baker Report) which has acquired prominence in ongoing court proceedings and which contains an implicit evaluation of the Compensation Program. It is addressed in Chapter XV.

Mr. Kaufman's evaluation of the Government response is contained in italicized sections entitled Analysis in Chapters III to XV. Key components of that analysis are reproduced in this executive summary.

Having described and evaluated the Nova Scotia Government's response, the Report then describes in Chapter XVI the responses in other jurisdictions to reports of institutional abuse. Chapter XVII discusses the recent study by the Law Commission of Canada entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. Drawing upon the lessons learned from the Nova Scotia experience and from the systemic materials from other jurisdictions, Chapter XVIII contains Mr. Kaufman's recommendations – the 'Blueprint for the Future' – and the Conclusion. These recommendations are reproduced, without the supporting commentary, together with the Conclusion, immediately following this summary.

FORMULATION OF THE GOVERNMENT RESPONSE (CHAPTER III)

In 1993, lawsuits or notices of impending lawsuits were filed, naming the Province as a defendant or potential defendant, seeking damages for sexual abuse allegedly committed upon former residents of provincial youth facilities by members of the staff. Patrick MacDougall, a former counsellor at the Shelburne Youth Centre ("Shelburne"), was the most notorious, having been convicted of 11 charges of sexual misconduct involving 10 complainants. MacDougall's case had also attracted notoriety based on the evidence at his trial that, even after the allegations against him had surfaced, his transfer had been arranged by Government officials to the Sydney Children's Training Centre to work as a night watchman. Two former counsellors at the Nova Scotia School for Girls had been convicted of sexual offences against the residents.

The Government contemplated that further lawsuits involving these staff members were likely, if not inevitable.

On November 2, 1994, the Minister of Justice, the Honourable William Gillis, advised the House of Assembly of the Government's intentions regarding "a response to incidents of sexual abuse at the Shelburne Youth Centre, formerly the Shelburne School for Boys." He told the House that the Government intended to proceed with a three-step process.

The first step was described as an independent audit of current practices at the Shelburne Youth Centre and other young offender institutions operated by the Department of Justice. This was to said to ensure that existing policies and procedures prevented any recurrence of abuse and to assure current residents and their families that young people in custody are safe and secure. Ms. Viki Samuels-Stewart was engaged to undertake this audit.

The second step was described as a thorough, independent investigation into the events that took place at Shelburne in order to determine what happened, who was involved, who knew what was happening and what actions were taken.

According to its Terms of Reference, this "comprehensive investigation" was to determine "the extent of sexual and physical abuse of boys housed in Shelburne" and, in particular, "whether any staff other than Patrick MacDougall engaged in sexual abuse of children." Practices and procedures in place at Shelburne "that permitted or hindered detection of abuse of children" were to be examined, as was "the state of knowledge of senior officials within the institution and the Department of Community Services as to abusive behaviour of staff towards children from 1956 to 1975." Finally, the investigator was to establish "what steps were taken at the Children's Training Centre in Sydney, where Mr. MacDougall was transferred from Shelburne, in order to ensure that children in Sydney were not placed at risk."

The third step was to be the offer of compensation to victims through an alternative dispute resolution ("ADR") process "if liability was revealed" through the investigation. The ADR process was to provide "fast and fair" compensation to victims and would be offered as a substitute for civil litigation. Individual complainants were free to pursue a claim through civil litigation.

It was said that the three-pronged response was intended to ensure that victimization not recur, determine what happened and who was responsible, and provide fair compensation for victims, all in a reasonable amount of time and at a reasonable public expense.

On November 7, 1994, the Minister of Community Services, the Honourable James Smith, advised the House that the Minister of Justice had acceded to his request to broaden the scope of the Government's response. It would now include an examination of residential facilities that either had been operated or continued to operate under the aegis of the Department of Community Services ("DCS"), as well as an examination of the Cesar Lalo case.

On December 1, 1994, the Minister of Justice announced that the former Chief Justice of New Brunswick, the Honourable Stuart G. Stratton, Q.C., had agreed to undertake the independent investigation announced in November.

The Minister noted that, without constraining Mr. Stratton, the primary focus of the investigation would be from about 1956 to the mid-1970s. The Terms of Reference would include the Nova Scotia Youth Training Centre in Truro, the Nova Scotia Residential Centre in Truro, and the Children's Training Centres in Sydney and Dartmouth.

Mr. Kaufman's analysis of the events includes the following:

It was appropriate, even commendable, that the Government recognize the need for an audit of its institutions to protect its current residents and ensure that policies and procedures were in place to prevent future incidents. Although I take some issue with how the Samuels-Stewart audit was conducted, the Government was well motivated in directing that an audit be conducted to this end.

It was also appropriate that the Government recognize that the extent of sexual and physical abuse needed to be determined, as well as the state of knowledge of senior officials. No one could quarrel with the desirability that the true facts be known and that persons be held accountable for wrongdoing.

The strategy becomes questionable when one examines the nature of the investigation that was established and the Government's commitment to an ADR program of undefined shape and size, if the investigation found liability.

The commitment to an ADR process found its origin in the Government's early thinking on how to respond to civil suits initiated by individuals whose victimization had been established in the criminal courts. It was not surprising – indeed it was laudable – that [the Department of Community Services] would suggest that a purely adversarial response to these civil suits would not be appropriate. As will be developed later in this Report, where criminal convictions have been registered against Government employees for their abuse of residents, one would expect the Government to consider a means to avoid a process that compels those residents to again prove their victimization to obtain compensation.

That being said, the announced three-pronged response was not confined, by its terms, to these claims, but was purportedly designed to determine the full extent of abuse, and then compensate its victims through an ADR process. How could the investigation to be conducted by Mr. Stratton serve that end? Its duration was to be short, its resources limited. It was unlikely that such an investigation could be regarded as either "thorough" or "comprehensive." Mr. Stratton had no statutory power to compel the production of documents or the testimony of individuals. Indeed, it was obvious that Mr. Stratton would not be conducting formal hearings or subjecting individuals to cross-examination by parties adverse in interest. It is, therefore, difficult to see how Mr. Stratton could find liability, except in those cases where abuse was uncontested or where it had been established in the criminal courts. As will be developed in later chapters, I am of the opinion that Mr. Stratton's investigation could not properly yield findings, given its mandate and the way it was conducted. The Government placed mistaken reliance upon this investigation to create a Compensation Program with little or no verification of individual claims.

The Government appears to have ill considered the interplay between the three-pronged strategy it had adopted and the criminal and disciplinary process. For example, there had been lengthy prior investigations conducted by the RCMP at Shelburne and at Truro. These had led to criminal charges against MacDougall, Hollett and Moss. There was a remarkable lack of interest within Government as to what these investigations had already determined, rightly or wrongly, about the extent of abuse within its institutions.

In the formulation of the Government strategy, accountability was stressed, without any explanation as to how such accountability would take place. (This was only addressed later in the Government Program and, in my view, inadequately.) As well, when one recalls that the Government formulated a three-pronged strategy in part to avoid gratuitously re-victimizing those subjected to abuse, it is surprising that inadequate attention was given to the implications of a strategy that might ultimately compel complainants to describe their alleged victimization to the Stratton investigation, to criminal investigators and again to Department investigators.

One has to question generally how the various options were presented to the Government. For example, [one option – traditional litigation] was described as denying liability and putting the plaintiff to strict proof of all allegations. In my view, this was an inaccurate description. As will be developed in this Report, traditional litigation permits the Government, as a litigant, the flexibility to evaluate the merits of each case, to settle cases of obvious merit, to admit liability and dispute the issue of damages only and, equally important, to litigate – even in highly contested matters – in a way that is respectful of the litigants and the nature of the allegations made. This is not to say that [litigation] was the only approach or that it could accommodate the needs and privacy interests of true victims of abuse to the same extent as an ADR process. However, the above description of traditional litigation virtually compelled the Government to reject this as an option to address allegations of institutional abuse.

THE SAMUELS-STEWART AUDIT (CHAPTER IV)

Although Ms. Samuels-Stewart's Terms of Reference included all provincially operated young offender institutions, she limited her review to the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville, primarily due to the short time frame allotted for the audit.

In March 1995, Ms. Samuels-Stewart completed her report, entitled *'In Our Care' - Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville*. The report was made public by the Government on March 29, 1995.

Ms. Samuels-Stewart found, *inter alia,* that:

- Persons held in custody at Shelburne and Waterville were not adequately protected against sexual and other abusive conduct (given the reported instances of sexual, physical, emotional and verbal abuse). Indeed, she found that young offenders at both institutions were victims of abuse while at these institutions.

- There was not an adequate system in place to ensure that complaints can be made, received and acted upon in a timely and effective manner. Young offenders and employees often do not report abuse, and when they do, the incidents are handled internally, which (in the words of the Report) "is not seen to be adequate."

- There were not appropriate mechanisms in place to ensure proper communication and follow-up between responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody.

Mr. Kaufman's analysis of the audit includes the following:

> *[I]t should be acknowledged that Ms. Samuels-Stewart's Audit Report contains a number of useful recommendations. However, that being said, in my opinion the Audit Report is significantly flawed, and these flaws may have contributed, albeit inadvertently, to the overall unsatisfactory nature of the Government's response.*
>
> *Ms. Samuels-Stewart was engaged to perform an audit into current policies and procedures. She was not mandated to investigate and determine the extent to which sexual and other abusive conduct was occurring or by whom.*
>
> *A significant portion of the Audit Report is devoted to whether offenders currently in custody are being abused. Much of the audit's methodology (the questions asked in focus groups, questionnaires and interviews) was directed to determining whether current offenders were being abused, the nature of that abuse and by whom it was being perpetrated.*
>
> *Even assuming that the Terms of Reference invited such inquiries, in my opinion the investigation was flawed. Abuse was defined so broadly as to be misleading. The focus groups were told that "abuse is usually someone exerting power over someone else leaving the victim feeling powerless." Ms. Samuels-Stewart advised my review that this definition appropriately recognized the subjectivity of abuse and showed sensitivity to the needs and concerns of young people. No doubt there is much truth in those comments, but that does not mean that the definition is appropriate to every context. Here, the residents' answers were used to support a conclusion that they were currently being abused.*
>
> *In summary, it is my view that:*
>
> - *The definition or description of abuse contained in the Audit Report was unhelpful in ensuring an accurate appreciation of the issues. In the context of a custodial setting, and in the context of the Government's response to serious allegations of physical and sexual abuse, the definition was potentially misleading.*
> - *The audit's Terms of Reference were not fulfilled. The existing policies, procedures, systems and mechanisms in place to ensure that complaints of abuse are made, received and acted upon appropriately and to ensure proper communication and follow-up between departmental authorities and police agencies, were inadequately audited and were not specifically addressed. Undue focus was placed on trying to investigate the nature and extent of abuse within the institutions, matters outside the Terms of Reference.*

- *The methodology used to fulfill the mandate was significantly flawed.*
- *As a result, the conclusions were not always supported by the evidence.*
- *Available evidence which could have qualified or altered those conclusions was not obtained by the auditor. Ultimately, the auditor bears the responsibility of ensuring that she has accessed the relevant evidence. She did not do so, although I recognize the time constraints placed upon her.*
- *The audit was not truly an audit. Instead, it was a collection of anecdotes and information, sometimes speculative or secured through processes that did not enhance the ultimate reliability or accuracy of the information.*
- *Many of the Audit Report's recommendations were not dependent upon the flawed findings and methodology and were deserving of consideration. However, a proper methodology and approach would have permitted detailed, precise recommendations directed to modifying existing policies, procedures and practices.*

In fairness to Ms. Samuels-Stewart, I must point out that many of the participants in focus groups spoke positively about her approach and found the sessions beneficial. Some of the responses to questionnaires and information communicated in focus groups invited concern and deserved follow-up and investigation. Further, Ms. Samuels-Stewart did recognize that the Report was to be regarded as exploratory and an initial evaluation only. She recommended that it be followed by a more in-depth audit in 12 months and annual audits thereafter. She also recommended that an external, independent body review the additional information received from the questionnaires and that the Correctional Services Division of the Department of Justice follow up on the other problems, concerns and recommendations put forward by respondents.

THE STRATTON REPORT (CHAPTER V)

On June 30, 1995, Mr. Stratton submitted his report to the Minister of Justice.

Although Mr. Stratton expressed some qualifications upon his findings, he concluded that the abuse claims presented to him (by a total of 89 former residents) were generally reliable and accurate. The former Shelburne School for Boys ("Shelburne") was the focus of much of Mr. Stratton's investigation. A total of 69 former residents of the school provided statements to the Stratton investigation, detailing 205 incidents of physical abuse and 103 incidents of sexual abuse. Although Mr. Stratton did not specifically find how many of these reported incidents occurred, he commented that, "leaving aside some exaggeration, ... my investigators were satisfied that in all cases, save perhaps three, the complainants were attempting to recall from their memories and truthfully report events and circumstances that had occurred some 20-40 years ago." Nineteen former or current employees of Shelburne were said to be implicated.

Mr. Stratton found that it could be "safely concluded" that counselors resorted to physical force to control residents, and that they had received direction from their superiors to do so. It was not until 1978 that there was an express prohibition against the use of physical force. Mr. Stratton concluded that the use of physical force was an accepted method of maintaining discipline and, as a result, it was sometimes "open season" on the boys at Shelburne.

Mr. Stratton further concluded that staff at the school and officials in the Department of Community and Social Services had been aware that abuse was taking place, but took no positive steps to end it at least until the mid-1970s.

He also addressed the appropriateness of MacDougall's transfer to the Sydney Children's Training Centre, allegations pertaining to the Nova Scotia School for Girls, the Nova Scotia Youth Training Centre and Cesar Lalo.

Mr. Stratton noted that a failure to complain was a common theme running through many of the statements he received from former residents of all the institutions, as was the failure of staff to believe the complaints that were made or to take any positive action in response. He stated he could "only infer that there was what I shall call a 'conspiracy of silence and inaction' probably inspired by a fear on the part of both residents and staff to 'rock the boat' or to draw unfavourable attention to themselves or to the institutions in which they were employed or resident." However, he also noted that it often might have been natural to disbelieve complaints of abuse made by children who, for varying reasons, might have had problems telling only the truth.

Mr. Kaufman's analysis of the Stratton investigation included the following:

The Honourable Stewart Stratton, Q.C., is a jurist of impeccable credentials and reputation. The Government can only be commended for his selection. But what did the Government ask him to do? Mr. Stratton was given only six months and very limited financial resources to [investigate all of the matters within his mandate].

It is unclear what the Government reasonably expected to obtain from this investigation, particularly as to alleged sexual and physical abuse of residents at the institutions. If Mr. Stratton was only to determine whether there were a sufficient number of complaints of abuse to warrant a public inquiry or an ADR compensation process which, itself, would evaluate the merits of individual *claims, then perhaps Mr. Stratton's investigation could have served this end. If, on the other hand, Mr. Stratton's investigation was to determine, among other things, how prevalent sexual and physical abuse actually was at these institutions, such that his 'findings' could be used to support compensation for claimants without further verification of their individual claims, then it was inappropriate and doomed to fail. Yet the Government ultimately used Mr. Stratton's conclusions, time and time again, to confirm that widespread abuse had occurred, and to support the uncritical acceptance of claims of abuse, even those which were not brought forward to Mr. Stratton.*

Why do I say that Mr. Stratton's investigation, if it was to determine the prevalence of sexual and physical abuse, was inappropriate and doomed to fail?

Apart from some admissions that some physical force (slapping, grabbing of arms, etc.) occurred that would now constitute abuse, and apart from conduct that had resulted in criminal convictions against MacDougall and others, the most serious sexual and physical abuse alleged to have occurred was challenged by the employees and former employees who spoke with the Stratton investigators. Assessments of credibility were therefore central to any determination of how prevalent such abuse was.

However, Mr. Stratton was not in any position to make assessments of credibility. Sixty-nine claimants alleged they had been abused. Eleven of them supplied their accounts in writing only. They were never seen by the Murphys [the two investigators retained by Mr. Stratton] or Mr. Stratton. Only one of the 58 other claimants was actually seen by Mr. Stratton personally. No one provided accounts under oath. No comparisons were made between accounts given to the Stratton investigation and to the RCMP, where applicable. In light of the time constraints, no effort was made to obtain relevant medical records from Roseway Hospital, or to search for institutional records of the residents or for employment records of the employees. At least three of the former residents who made serious abuse allegations against MacDougall were not at Shelburne when he was. This is an example of information which could have been, but was not, obtained by the Stratton investigation.

This is not to say that all the allegations made to the Stratton investigation were false. Indeed, it says nothing about the truth or falsehood of these allegations. But it does demonstrate that neither the Murphys nor Mr. Stratton were well situated to make findings of credibility or evaluate the merits of disputed claims or the prevalence of abuse generally.

Mr. Stratton recognized many of these limitations in his Report. It was appropriate that Mr. Stratton [do so], although, as I later note, these warnings went unheeded when the Government moved to the third prong of its response – the Compensation Program.

It was also appropriate that Mr. Stratton state, as he did, that there was physical and sexual abuse at some of the institutions examined. After all, convictions against MacDougall and others had already demonstrated that. Similarly, there was general agreement among former residents and employees that physical force had been used in the past by employees to control residents – force which might now be regarded as unacceptable, although the nature and extent of that force remained in dispute.

With great respect to a learned jurist, the limitations upon his investigation were so fundamental and of such magnitude that no general conclusions as to the residents' allegations should have been stated, particularly publicly. It was no answer to say that the conclusions were qualified, any more than it would be fitting for a trial judge to state that an accused is probably guilty, although he or she has not yet heard all the evidence. The fact that a jurist of Mr. Stratton's stature found the abuse claims to be generally reliable and accurate could only contribute to the perception of the public and the Government that an objective, detailed investigation had confirmed the existence of widespread systemic abuse, perpetuated through a "conspiracy of silence and inaction." And that is exactly how the Report was received and acted upon.

I am convinced that the Stratton investigation might have been better served if additional witnesses, institutional and medical records, and prior statements of complainants had been pursued. The investigation might have reflected greater balance if former residents who denied being victimized or having observed abuse had been interviewed, or if implicated employees had been able to respond to specific allegations. In fairness, such an approach was incompatible with Mr. Stratton's time constraints and limited resources. But even such an investigation – absent any real opportunity to meaningfully test the evidence proffered – could not have provided the Government with sufficient assurances that the residents who complained to Mr. Stratton (apart from those whose veracity had already been established in the criminal process) could be compensated without further verification. So I return to my introductory remarks: if that was the purpose of the Stratton investigation, it was inappropriate and doomed to fail.

Mr. Stratton clearly felt that his investigation provided a sufficient basis to enable the Government to bypass a public inquiry and move directly to the ADR process. However, I readily accept his explanation to me that he never contemplated that his Report would be used to justify an ADR process that required little or no verification of individual claims.

The Government appears to have been largely committed to an ADR process before Mr. Stratton even began his work. Continuing on with that process seemed only to be contingent upon a finding by Mr. Stratton that physical and sexual abuse had occurred. Of course Mr. Stratton would find physical and sexual abuse – such findings had already been made at MacDougall's criminal trial. It is, therefore, difficult to see what Mr. Stratton could have found that would have reversed *the direction of the Government's response. Indeed, it can be argued that Mr. Stratton's mandate was framed in a way that made it virtually inevitable that the Government would be proceeding with its ADR program after his work was completed.*

The Stratton investigation [was] well intentioned and executed with the utmost good faith. It did collect evidence of abuse that deserved the fullest consideration, through a true investigative process. However, I cannot help but conclude, for the reasons indicated above, that Mr. Stratton's conclusions went beyond the scope of what fairly could be said.

THE ORIGIN OF THE COMPENSATION PROGRAM (CHAPTER VI)

On July 20, 1995, the Minister of Justice outlined the components of the ADR option that had been approved by Cabinet as the third phase of the Government's response, including:

- Counseling services for victims, already in place, would be expanded. The Family Services Association ("FSA") had been retained to provide interim counseling and provide an important, non-government contact point for victims;
- A 1-800 line had been established to provide easy, direct access to FSA. The number would be advertised. As well, Mr. Stratton would contact all victims that he identified to ensure they were aware that counseling was available and of the ADR process;
- An ADR process would be available to residents of any of the five institutions that were the subject of the Stratton investigation. The victims of Cesar Lalo would be offered mediation as a method of determining compensation;
- The Family Services Association would assess whether victims could be organized into an advocacy group or groups, and would assist victims in establishing such a group. The advocacy group would be provided with publicly funded legal representation. It would discuss a range of issues with Government. An agreement regarding compensation and other assistance for victims of abuse would be one objective of those discussions;
- Once compensation levels were determined, each victim would choose whether to enter into an adjudication process. A victim could decide that litigation was more appropriate. However, anyone who did enter the adjudicative process would be required to waive their right to sue the Province. An independent adjudicator would

assess individual files and award compensation, based on factors such as the level of abuse suffered;

- It was anticipated that the process would take 12 to 18 months to complete. This was "relatively fast" compared to other possible remedies;

- The Stratton investigation identified 89 complainants. The Government anticipated that others would identify themselves;

- The Stratton Report identified criminal activities. The Report had been turned over to the RCMP for appropriate action. The RCMP would respect the complainants' right to privacy. The Stratton investigators would make contact with victims, and only those who consent would be contacted by police;

- An internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. The internal examination would reach beyond those who may have perpetrated abuse. The actions or lack of action of those who could have or should have had knowledge of such abuse were also under investigation.

Mr. Kaufman's evaluation includes the following:

In his press conference on July 20, 1995, the Minister described Mr. Stratton's work as "far reaching" and "exhaustive." He did not caution the public that the 'findings' were qualified and made without the procedural protections available to accused persons (and, therefore, should not be used to infer abuse without verification in individual cases). It is apparent that the Government was swept up by the prevailing opinion that abuse was widespread and systemic.

In fairness, when the Government considered its alternatives in early and mid-1995, it was not yet clear that it would adopt an ADR process that involved little or no validation of individual claims. When the ADR option was presented to Cabinet in July 1995, it was proposed that decision-making on disputed claims would be done by an adjudicator, based upon evidence under oath and with validation. The terms of the ADR process would be negotiated once victims were organized into an advocacy group.

However, as we see later, when the framework for the ADR process was negotiated between the Government and counsel for the claimants, true validation of claims fell by the wayside, as did any requirement that statements be taken under oath. Negotiators also abandoned the requirement *that a single advocacy group speak for claimants. Put simply, the ADR process that was ultimately negotiated was very different than that proposed to, and approved by, Cabinet in July 1995.*

In his press conference, the Minister stated that Mr. Stratton had identified criminal activities and that his Report had been turned over to the RCMP for appropriate action. He indicated that the Stratton investigators would make contact with victims, and only those who consented would be contacted by the police. With respect, if these allegations of abuse were to be believed, they revealed, in many instances, serious physical and sexual abuse, sometimes perpetrated by current employees. Even recognizing the desire to accommodate the privacy interests of complainants, the Government was in breach of its duty to protect the public by giving complainants the absolute right to determine whether such abuse would be reported to the police. Admittedly, the authorities are entitled to exercise their discretion not to proceed on criminal charges, and this discretion may be based, in part, on the wishes of complainants, particularly their desire for anonymity. However, the public interest required that this decision be made by the authorities. Once a complaint has been made known to government, certain statutory obligations are triggered. These are designed to protect vulnerable persons from further abuse. It was only much later that the Government recognized that assurances of confidentiality offered to complainants by Mr. Stratton and then preserved by the Government were inappropriate and, indeed, possibly unlawful.

THE MEMORANDUM OF UNDERSTANDING (CHAPTER VII)

On May 3, 1996, the Minister of Justice announced in the legislature the establishment of the Compensation Program. As part of that announcement, he delivered an apology to the victims of abuse.

A Memorandum of Understanding ("MOU"), created after lengthy discussions between counsel for claimants and Government officials, initially served as the framework for the Compensation Program. It covered the three institutions at which the Stratton Report found that abuse had occurred: Shelburne, the Nova Scotia School for Girls and the Nova Scotia Youth Training Centre. It provided compensation for what it termed "survivors" of physical or sexual abuse at those institutions.

Its terms are fully developed in the Report itself. Here, it is sufficient to note that categories of abuse with corresponding ranges of monetary compensation were set out in a grid. Claimants were to submit Demands to the Compensation Program, which were to be responded to in writing by file assessors within 45 days. Assessment of Demands were based on claimant statements, medical or other records. No role was allowed for former or current employees. Any dispute with respect to the truth of allegations of abuse or amount of compensation was to be resolved through "negotiation." If an agreement was not reached, the matter could be referred for a "file review" before a file reviewer to be selected by the claimant from an agreed upon list. The claimant would appear personally before the file reviewer. Counsel for the claimant and for Government would make submissions to the file reviewer who was to be provided with limited information and would not hear from other witnesses. Non-monetary benefits, particularly counselling, were also provided for.

Mr. Kaufman commented on the MOU and its creation, in part, as follows:

> *The discussions between claimants' counsel and Government officials were characterized differently by each in their interviews with my staff. Government officials regarded them as true negotiations, leading to agreement. Claimants' counsel felt that there was a power imbalance in favour of Government, to the point that terms were often imposed, rather than negotiated.*
>
> *In my view, inadequate consideration was given to what the MOU's legal status was. This later became obvious when the Government made unilateral changes to the Program, scrapping the MOU. Having said that, I am not persuaded that the claimants' counsel were at such a disadvantage that their discussions cannot be regarded as negotiations. The claimants were represented by forceful and effective counsel. Public opinion largely favoured their position, putting pressure on the Government to fully accommodate their interests. Paula Simon, the Government's chief negotiator, was herself highly motivated by experience and background to recognize the claimants' plight. The Government had already announced that an ADR program would be negotiated with the full participation of claimants' counsel. Finally, the terms of the MOU belie any suggestion that the Government imposed a one-sided process upon claimants. On the contrary, some features of the MOU support the view that claimants' counsel were full participants in the process. For example, claimants were given the right to choose the person who would conduct the file review of their claim, from a list of file reviewers chosen in advance by the claimants (and accepted by the Province).*
>
> *During these negotiations, it became apparent that the number of claimants had dramatically increased, and was continuing to increase. Based upon the 89 complainants who came forward to Mr. Stratton, the Government had contemplated that two or three times that number might advance claims. It was felt that this estimate was supported by the experience in other jurisdictions. However, by March 8, 1996, it appeared that the number had grown to approximately 350. (Indeed, on March 7, 1996, the RCMP advised the Deputy Minister that 410 alleged victims had already been identified.) As the numbers increased, cost projections were adjusted to anticipate 500 claimants. These numbers caused Government officials to reconsider the available options. For example, in February 1996, Ms. Simon considered whether the budget should be increased to $30 million, the cap should be reduced to $60,000, the present budget should simply be divided amongst all claimants or negotiations should be terminated altogether. What is striking – indeed remarkable – is that there is no demonstrated appreciation that the number of claimants should invite some introspection about*

the validity of all of these claims. Indeed, if one examines the cost estimates presented by Ms. Simon, they assume the validity of all 500 claims!

This attitude is seen in the Government's negotiating stance on validation. In discussions with claimants' counsel, Government negotiators suggested that validation was unnecessary where criminal convictions had been registered. This was an appropriate concession. Where validation of a claim is inherent in a criminal finding of guilt, it should be unnecessary to compel the claimant to re-establish the abuse. However, the Government promoted minimal validation for all other claims as well. It was looking for a summary process. With few exceptions, the Government regarded the statements of abuse to be true and did not generally anticipate disputes over whether abuse occurred. As a result, statements taken by the Murphys or by the IIU would be accepted. At times, Government officials indicated that they would look for documentary confirmation that the employee and resident were at the institution at the same time, and that some medical records might have to be examined. But the view was also expressed that medical and psychiatric records would generally be unnecessary. There would have to be a concrete reason for doubting a claim.

It is ironic that claimants' counsel, concerned that their clients might be disbelieved, advocated a more stringent type of validation process: an arbitration hearing to resolve disputed claims. Later, to respond to the Government's desire for a speedy process, they proposed that the hearing not exceed three days. However, this was rejected by Government officials.

It is not surprising that Government officials did not contemplate the possibility that employees should be parties to the negotiations that led to the MOU. The alleged abusers had not participated in similar programs in Ontario and elsewhere. Their participation alongside claimants would have been regarded, given the outlook at that time, as re-victimizing the victims. As well, the point would have been made that employees were not affected by this process: they were not being asked to make admissions of liability or compensate the claimants. It is, however, surprising that Government negotiators did not even contemplate a role for employees in being heard as to whether the claims were valid, that is, as part of a validation process.

In my view, the position advanced by the Government negotiators that little or no validation was required for claims was a recipe for disaster. It was unsupported by the Stratton 'findings.' As I earlier noted, even the most generous interpretation of the Stratton Report could hardly justify the uncritical acceptance of unverified claims which were never made to Mr. Stratton.

The Government's approach was rooted in several fundamental errors. It is necessary to elaborate upon two of them here.

First, there was often an uncritical acceptance that all but a minute number of claims would be legitimate – regardless of who was making the claims, how the claims had been generated, the existence of any motivation to make false claims and, most important, the absence of any meaningful disincentives put in place to the making of false or exaggerated complaints.

Judicial and legislative developments [described in detail] that permit the evaluation of sexual offence complainants, indeed any witnesses, free from stereotypical or discredited notions about their credibility, can only be welcomed. However – and here is the critical point – these stereotypical or discredited notions cannot be replaced with equally pernicious notions that all sexual offence complainants should be regarded as presumptively reliable, regardless of their backgrounds or the circumstances under which their complaints were brought forward.

It is instructive that even the claimants who met with me recognized the obligation to verify abuse claims, to separate out true and false claims, and provide alleged abusers with an opportunity to respond.

There was a second fundamental error revealed in the Government's negotiations respecting the MOU. Government officials assumed that only an ADR process which sheltered claimants from a critical evaluation of their claims – even to the point of excluding employees from any meaningful participation – could accommodate the concerns of true victims of abuse. Cabinet was effectively asked to choose between not accommodating victims by forcing them to pursue traditional litigation and accommodating victims through a user-friendly ADR process. It is a serious mistake to assume that neither traditional litigation nor arbitration can accommodate the needs of true victims of abuse. To a greater or lesser extent, both can.

Furthermore, an alternative process such as a compensation program can even better accommodate the needs of true victims of abuse in a way that is compatible with the need to discover the truth and to accommodate the rights of those accused to defend themselves. This was not understood. Instead, out of concern for the needs of true victims, the Government was prepared to jettison components of programs in Ontario, already victim-sensitive, to better serve the victims' needs. In so doing, it failed to appreciate that those components were sometimes designed to better ensure the integrity of the process.

In our interviews with Government officials the view was expressed that employees did not need not be involved in the design of the Compensation Program. Their point was that the decision to compensate individual claimants was made without prejudice to the employees implicated as abusers. Settlements and file review decisions were confidential and were not legally binding upon employees. Employees were required to make no financial contribution to the process. They would *benefit from the fullest of legal and constitutional protections, should they have to defend themselves in criminal, civil or disciplinary proceedings. Accordingly, it was said, employees were not in any way prejudiced by the process.*

As will be developed elsewhere, there are serious difficulties with the view that employees were not prejudiced by this process. The very public apology offered up by Government on May 3, 1996, followed by the compensation of many hundreds of claimants, and the reassignment or suspension of staff, sent a very clear message, particularly in small communities, that the guilt of many employees had been decided.

Cabinet approved the continuation of the process, with an anticipated budget of $33.3 million, on March 21, 1996. There is no indication that the above issues – the appropriateness of a process that minimally verified claims, that excluded employees from any role in a verification process, that did not require statements under oath – were raised with Cabinet.

The MOU was finalized within a short time of Cabinet's approval. Indeed, the entire negotiations spanned only seven meetings and approximately three months. It is interesting that Cabinet's earlier approval in July 1995 had contemplated a year-long negotiation process, even when it was expected that the negotiations would take place with one or two advocacy groups representing all claimants. Despite internal and external pressures, it is difficult to see why the Government felt compelled to conclude the negotiations so hastily.

As detailed in Chapter VIII, the IIU and RCMP investigations were underway. Even at the earliest stages, the enormous investigative task was apparent. Mr. Stratton's investigators told my staff that time had not permitted them to look for or obtain medical records, speak to medical personnel or even obtain records to confirm the presence of complainant and employee in the institution at the same time. New documentation was being uncovered. By December 1995, the IIU had uncovered well over 1,000 files which had not been available to the Stratton investigation. The RCMP had assembled a task force, which suggested there were volumes of documentary material, requiring major case management. By March 7, 1996, nine investigators were committed to the task. Potential claimants were being identified.

In my view, as the number of claimants escalated to a level not previously contemplated (at least by the Government), it was important that decisions as to the scope and nature of the Compensation Program be based upon adequate information. In this context, this meant that, at the very least, the Government should have structured a process that permitted it to determine the number of eligible claimants prior to concluding the MOU. Alternatively, as was done in Grandview, the Government could have closed eligibility to the Program, while recognizing that later claims might still be dealt with, but not necessarily in the same way. Or, the Government could *have decided to defer resolution of claims not already validated through the criminal process until criminal and/or disciplinary proceedings had been completed. No doubt, it would have been contended that true victims would be harmed by these approaches, and that any such measure would have driven claimants to litigate. Be that as it may, a Government response with true credibility may have compelled such an approach. Such measures, if adopted, would also have ensured that it was unnecessary to change the existing Program mid-stream, causing individuals whose claims had not been processed and who had truly been abused, to feel, with complete justification, that they had been betrayed and unfairly treated.*

As for the contents of the MOU itself, Mr. Kaufman's comments included the following:

I take issue with a number of the MOU's provisions. Some are inconsistent with a meaningful validation of claims. The time lines within which the Province was to respond to an initial Demand, and respond to a submission to file review, not only reflected Government's disinterest in true validation, but also ensured that it could not take place.

The MOU articulated no explicit burden of proof. It identified the parties to appear before a file reviewer, and the "Statement Volumes" to be available to the reviewer to quantify damages, but otherwise was largely silent as to the procedures at the review. There was certainly no suggestion that the file reviewer would hear from employees or others adverse in interest to the claimants. Indeed, not even Government counsel were entitled to attend a file review pertaining to an unrepresented claimant. As for as documentary evidence, the MOU reflected that compensation would be determined by reference to written statements taken by the Stratton investigators, the IIU or a police agency and, at the option of either party, the institution's medical records. Certain medical reports could also be resorted to in certain circumstances.

In my view, the gaps in the MOU pertaining to validation supported the apparent understanding of claimants' counsel (based on communications from the Government negotiators) that little or no verification would be required. As we will see, conflicting views soon surfaced as to how claims should or should not be validated.

THE COMMENCEMENT OF INVESTIGATIONS (CHAPTER VIII)

When the Minister of Justice announced at the July 20, 1995, press conference that the Government had approved an ADR process to compensate abuse victims, he also stated that an internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. He also announced that the Stratton Report, which had identified criminal activities, had been turned over to the RCMP for appropriate action. He cautioned, however, that the RCMP would only approach those victims who consented to being contacted by the police.

Accordingly, during the period leading up to the negotiation of the MOU, the Internal Investigations Unit ("IIU") was formed and commenced operations, and the RCMP initiated an investigation. As part of the investigative process, the Murphys (who had first been engaged by Mr. Stratton) were re-engaged by the Government.

Mr. Kaufman's analysis of this aspect of the Government response includes the following:

> *The theory that current employees were to be the subject of an independent and fair investigation by experienced investigators had obvious merit, as did [the] view that disciplinary action could not be grounded upon the Stratton 'findings.' The difficulty I have here is how the Government addressed the interplay amogst the Stratton, ADR, disciplinary and criminal proceedings.*
>
> *The Government's response to reports of institutional abuse was based, in part, upon the laudable desire to prevent the revictimization of true abuse victims that can occur when they are compelled to seek redress through formal litigation. However, complainants were potentially being exposed to multiple statement-taking sessions. The existence of a criminal investigation meant that many of them would have to provide a statement to the police. The existence of an independent IIU investigation meant that many would have to provide another statement for disciplinary proceedings. Further, if the Government was intent on moving forward at the same time with a Compensation Program, and if such a program was to be credible and fair, validation might have required that the claimants provide yet another statement, unless validation could have been merged with the disciplinary process. It is well recognized that forcing true victims to recount over and over their victimization may adversely affect their emotional well-being.*
>
> *Of equal concern is the possibility that the Stratton investigators, the IIU and the RCMP may have had very different perspectives on how statements should be taken. The IIU and RCMP regarded the Murphy statements, rightly or wrongly, as flawed. It was suggested that they were not 'pure version' statements: they were suggestive and not in the words of the witness. The Murphys, on the other hand, felt that the statements were appropriately taken and accurately captured the words and intent of the witness. It was not until December 1996 that the decision was taken to develop a statement protocol. Such a protocol was finally signed on April 24, 1997. However, it appears to have done relatively little to resolve the conflicts between the RCMP and IIU in particular.*

In my view, the Government created parallel investigations without ensuring, up front, that they would interrelate in an efficient and productive way. The parallel investigations meant, in practice, that witness interviews were uneven – at times supportive and other times adversarial – and that data was shared imperfectly, when it was shared at all.

THE EARLY DAYS (CHAPTER IX)

The Memorandum of Understanding took effect on June 17, 1996. The Program office asked the IIU investigators for all the information they had on the claims being made, but the only information the investigators had, for the most part, was the dates of intake and release of the claimants and employee information at the various institutions.

The terms of the MOU required the Province to respond within 45 days after receipt of a Demand submitted by a claimant. Twenty claims had been submitted by mid-June; the first responses were therefore due by August 1st. By June 21st, the Program had received 154 Demands. Four weeks later, the number had risen to 259. The sheer number of claims made it difficult for the Government to respond within the agreed upon period.

The IIU was requested to provide institutional records for each of the claims. However, the records were not computerized and the information could not be quickly accessed. For the most part, during the period from June 17th to October 31st, file assessors had little more than the dates of a claimant's intake and release from the institution, and whether or not the alleged abuser was employed at the institution while the claimant was there. Concerns were also raised by Program staff that the lists of institutional employees that had been provided to them were not complete.

By August 14, 1996, 351 Demands had been received from claimants. However, the Murphys had identified 900 potential claimants (many of whom, obviously, had not yet filed a Demand).

There was marked frustration by those involved in the Program over the scarcity of information upon which they were required to base their decisions. In situations where they did not believe in the validity of a claim, there was not enough information to disprove it and, according to the design of the Program, it had to be accepted as valid. The assessors stated that the onus was on the Province to disprove the abuse alleged; the benefit of the doubt was given to the claimant.

On November 1, 1996, the Government announced that the Compensation Program was placed on hold so it could take stock of concerns that had arisen during the first few months of the process, including a significant increase in the number of claims and the discovery hundreds of files that were thought to have been destroyed.

Mr. Kaufman's comments include the following:

As I noted in a previous Chapter, the Government had created a Compensation Program that did not contain a true validation process. The absence of meaningful validation is supported by an examination of the early operation of the Program.

As outlined above, my staff randomly reviewed a number of claim files to assist in providing me with an accurate sense of how the Program operated in practice. This random review demonstrated that during the early operation of the Program file assessors 'accepted' claimants' assertions of sexual and physical abuse without any input from the current or former employees who were alleged to have committed the abuse or from witnesses who might reasonably be expected to have relevant evidence on the issue. As well, file assessors 'accepted' claimants' assertions of abuse without the benefit of documentation that might bear upon the claimants' credibility or reliability. (This is not intended as a reflection on the assessors, but on the Program itself.) Perhaps the argument could be made that employees were not entitled to be full parties to the design of an ADR process. But even if that were true, it remained sheer folly to accept abuse claims as valid without even knowing what the implicated employee had to say.

The number of claims being processed, the time constraints imposed, the limited information available to assessors, the recognition that abuse was to be presumed, the absence of any right to test the claimant's evidence or to call contradictory evidence even if it were available, all contributed to the absence of a credible process to properly evaluate claims.

Some of the claims were regarded with incredulity by the file assessors but, absent a demonstrable falsehood, they did not feel that they could deny the claim. Instead, they felt that they could only rely upon the perceived improbabilities of the claims to negotiate a lesser amount.

Another scenario presented itself. Individuals who had testified in the criminal process sometimes claimed abuse far more extensive than testified to earlier. Under these circumstances, assessors treated the claim as exaggerated and tried to settle the claim at an amount compatible with the criminal testimony. In this sense, claimants who had testified in the criminal proceedings might be challenged on their statements in a way that was unavailable to assessors for the balance of claimants.

Our random review of the claim files permits me to conclude that some claims – whatever their actual merits – were deserving of close scrutiny and invited serious doubts about their veracity. A true validation process would have permitted these claims to be properly evaluated. Instead, file assessors were driven to either accept dubious claims because they could not be disproven, or *engage in the equally flawed process of settling them at reduced amounts. The latter approach was largely motivated by the realization that, absent demonstrable falsehoods, the file reviewers were likely to accept the claims in full. Even recognizing this flawed process, assessors should not have settled claims where any deliberate falsehoods had been demonstrated. This could only further undermine any remaining credibility of the Program. The concerns expressed here are further addressed in later chapters as the Program continues.*

None of these criticisms is directed to the claimants or their counsel. They correctly perceived that the approach by assessors to their claims was, at times, incompatible with the spirit of the negotiations leading to the MOU, and the MOU itself. Nor should these criticisms be borne by the file assessors. They were themselves trapped within a flawed process. Furthermore, I do not believe, as alleged by claimants' counsel at the time, that file assessors were systemically attempting to 'low ball' true victims of abuse.

It is obvious from my review of the documents that there were a number of circumstances that explain the Government's decision to suspend the Program on November 1, 1996. These included:

- *The anticipated over-expenditure of the Compensation Program budget given the increased number of claimants;*
- *Perceived problems with the file review process;*
- *The discovery of additional information from documentation and from employees that could impact on the assessment of claims;*
- *The lack of tools in the Compensation Program process to effectively test credibility.*

Claimants' counsel questioned whether the suspension was truly motivated by the discovery of additional information or the perceived problems with the validation process. It was suggested that the prime reason was budgetary: the Program was simply regarded as costing too much money.

I am not in a position to rank the reasons for the suspension of the Program. I am satisfied, however, that all of the above contributed to the decision.

The suspension undoubtedly caused turmoil to true victims of abuse. Nonetheless, I am unable to conclude that the Government acted unreasonably in suspending the Program, given the serious concerns about its design and implementation, and how those concerns potentially had an impact on the overall resources of the Province. Of course, as I reflect throughout this Report, the most serious deficiencies in the Program could, and should have been, foreseen. Had they been *foreseen, a redress program might have been designed and implemented that served the needs and interests of true victims of abuse, but not at the expense of fairness to other affected parties or to the credibility of the Program itself.*

EVENTS DURING THE SUSPENSION (CHAPTER X)

On December 6, 1996, only one month after the Compensation Program was suspended, the Minister of Justice, the Honourable Jay Abbass, announced that the Program would resume, with a number of steps designed to improve the process:

- Staff resources would be increased to address the sheer volume of claimants;

- The 45-day time limit for responding to demands would be extended to 120 days, though efforts would be made to respond earlier if possible;

- The IIU would expand their investigation from discipline of current employees to include investigation of compensation claims. Resources would be added to enable this;

- Increased resources would allow staff to catalogue and input new information recently found relating to Shelburne;

- To preserve the integrity of the criminal investigation, a statement protocol would be developed by the RCMP, IIU and Facts Probe Inc. All three organizations would share information and coordinate investigations to the fullest extent possible, recognizing the independence of the police investigation;

- Victims would now be advised that all statements provided for compensation purposes would be used for investigative purposes (whether criminal or disciplinary) or the Child Abuse Registry. The Minister stated that "[w]e understand it has been difficult for people to come forward, and their wish for confidentiality, but we have a moral and legal obligation to bring perpetrators of abuse to justice;"

- To ensure that file reviewers were provided with the best available evidence, claimants and the Province would now be permitted to submit written, recorded or documentary proof from anyone who had evidence relating to a claim. The Minister stated that "[t]his allows victims to bring forward statements from witnesses, and ensures the file reviewers have the most complete information possible when making their decisions;"

- File reviewers would now be assigned on a rotating basis;

- All file reviews would be conducted within Nova Scotia. Those living outside the province would be able to participate by telephone. The file review process would resume February 1, 1997;

- Though levels of compensation would remain the same, awards over $10,000 would be paid over a four-year period. The greater of $10,000 or 20 percent of the award would be paid in one lump sum payment, and the remainder paid over time with interest. The opportunity to use counselling allotments would remain unaffected – those allotments would still be accessible immediately. Counseling allotments would be available for a four-year period;

- The Government would continue to accept claims or notices of claims until December 18, 1996. The settlement of claims would resume once the total number of claims was known on December 19, 1996;

- Compensation would only be provided for abuse by employees and not for abuse of one resident by another. This was described as a "clarification."

Mr. Kaufman's comments include the following:

To evaluate the decisions to suspend and reinstate the Program, it is important for me here to draw together what we know about the Program up to its suspension.

Up to the suspension, 271 claim files had been completed. The vast majority had been settled. Approximately 33 had been decided by file reviewers. Compensation was being paid in all these cases. Whether settled or decided by a file reviewer, all of these claims had been processed under the MOU. This meant that assessors generally presumed, in the absence of demonstrable falsehood, that abuse had occurred. As earlier noted, even in the face of some demonstrable falsehoods, the balance of a claim might be settled because it could not be disproven. Most disputes turned on where the abuse fell within the designated categories. Though the documents pertaining to the Compensation Program do not always permit precise calculations, it appears that approximately 424 claims were processed prior to the Program's suspension. Only 22 claims were entirely denied by file assessors (subject to the claimants' right to file review). Offers were made in about 383 cases.

Despite the large number of cases completed (271) and the larger number of offers made (383), assessors and file reviewers had no input from current or former employees as to the merits of any of these claims. No one was interviewing past employees. Such interviews did not commence until January 1997, after the Program was reinstated. As I outline in the next chapter, even then, they were initially only telephone contacts that could not be used in file reviews. Very limited interviews of current employees by the IIU had only commenced in September 1996, and those were directed to the disciplinary proceedings, rather than the compensation process. The IIU was providing file assessors with limited information. In fact, it was made clear to the IIU that the Program did not contemplate that the IIU would truly investigate these claims or conduct witness interviews to assist the assessors. It follows that offers were made to claimants, and file review decisions were rendered, without resort to evidence of fundamental importance. Hence, my earlier determination that the validation process was seriously flawed and lacked credibility.

It can be debated whether the Program's suspension was primarily driven by financial concerns or by concerns that the Program was not doing a very good job in credibly separating out true and false claims. It is probably most accurate to say that the Government's attention was more easily drawn to the concerns expressed by Program staff and others about the Program's credibility because it was also costing the Government an extraordinary amount of money. (A revised Government estimate as of October 11, 1996, forecast the Program to cost $86 million (assuming no changes to the Program), resulting in an over-expenditure of the original estimate of approximately $52 million.)

Despite the fact that the Government apparently recognized that there were problems with the Program's design and operation, prompting its suspension, I am not convinced that the Government fully appreciated the extent of these problems.

Even if the Program was to be reinstated, Government did so – with due respect – in a 'patchwork' fashion. As discussed in later chapters, immediately after the Program was reinstated, it was obvious that the Program required further reworking.

Having said that, I recognize that a number of the changes made to the Program appeared to be reasonable ones. If the Program was to continue, it was appropriate to extend the 45-day turn around time for the Province's Responses and increase staff resources to allow claims to be investigated and newly discovered documents to be catalogued and inputted. Development of a statement-taking protocol, recognition that the IIU would be permitted to interview claimants rather than rely solely upon prior statements, and the right of the parties to submit written, recorded or documentary proof from anyone who had evidence relating to a claim also represented improvements over the MOU.

It made sense to assign file reviewers on a rotating basis. The entitlement of each claimant to select his or her own file reviewer contributed to the lack of credibility of the validation process and invited suspicion that reviewers were selected based upon prior generous awards to other claimants. Another reasonable alternative would have been to provide for selection of file reviewers on a rotating basis subject to a mechanism that would permit selection of a particular file reviewer, on consent, based on special expertise, knowledge or experience.

It was also appropriate to rectify the arrangement that had permitted claimants to restrict the use that could be made of serious allegations of abuse, regardless of the potential dangers to vulnerable young people or the public at large. Such an arrangement was incompatible with government's duty to protect young people from suspected abuse.

The Government decided to pay out awards over time, rather than in one lump sum payment. There had been accounts – some of which were verified by individuals who spoke with me – of large awards being squandered by recipients or otherwise misused. Some, although not all, of the claimants who spoke with me suggested that payments over time made sense and avoided abuses. Others favoured an approach that would permit the method of payment to be determined on a case-by-case basis.

Despite some changes for the better, the Program remained seriously flawed. Continuation of the Program did not await completion of either the criminal or the IIU investigation. Indeed, it did not even await receipt by Government of the particulars of the claims being advanced, which would be contained either in claimant statements or in the Demands. As I outline later in this Report, true validation of individual claims could not be done in a vacuum; from the perspective of both claimants and employees, validation would benefit from some ability to compare claims and the other evidence bearing upon them. Such investigative comparisons could yield corroborative evidence of individual claims. It could also demonstrate the likelihood of collusion or the contamination of one claimant's account by another.

The Program now contemplated the use of written, recorded or documentary proof, but it would remain difficult to use that material credibly within a process that permitted no witness other than the claimant to be called at the file review. The turn around time for Responses was extended only to 120 days, unlikely to permit a thorough internal investigation and assessment – especially given the likely flood of additional notices of claims to be received on or before December 18, 1996, and the fact that the recently discovered documentation had not yet been catalogued and put in place.

An examination of the Program, as reinstated, supports these conclusions. As described in the next chapter, cracks quickly surfaced in the reinstated Program. Assessors and investigators struggled to meet the 120-day deadlines and were forced to decide which investigations should be *abandoned in the interests of time and resources. They were inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Assessors and file reviewers struggled with how, if at all, employee statements could or should be used to resolve issues of credibility.*

In the meantime, true victims of abuse suffered. The position advanced by claimants' counsel – namely, that such victims were being re-victimized by unilateral changes in the process – had merit. Undoubtedly, these changes were also seen as a betrayal not only of the spirit, but of the express terms of the MOU, negotiated in good faith.

Some changes were seen as outright reversals of the MOU. For example, the reinstated Program did not compensate for inter-resident abuse. This was a result of the Government's dissatisfaction with how some file reviewers had addressed the issue of condonation. The change was described as a "clarification." With respect, condonation was expressly addressed, rightly or wrongly, in the MOU. The Government's surprise when compensation was awarded on the basis of condonation represented, at best, a misunderstanding of what their own negotiators had agreed to. I agree with the perspective of claimants' counsel that this change was more properly characterized as a reversal than a clarification.

Be that as it may, on balance, I am of the view that the flaws in the Compensation Program required rectification, despite the potential impact upon some claimants. A Program that lacked credibility and fairness did not ultimately enure to the benefit of true victims either, since their claims were tarred with the same lack of credibility that pervaded the Program itself. However, had the Government structured a credible Program from the outset, it would have better served those whom the Program was designed to help. Further, as alluded to above, and elaborated on in the chapters that follow, the changes which Government made did not rectify the serious flaws in the Program.

RESUMPTION OF THE PROGRAM (CHAPTER XI)

The Compensation Program remained problematic once it resumed. This chapter documents these problems up to the release of new "Compensation for Institutional Abuse Program Guidelines" on November 6, 1997. These were to provide the framework for the continuing Program. They appeared to replace the MOU, and were made without any prior consent or approval of claimants' counsel.

The Guidelines have many features that distinguish them from the original MOU. Some of these features were already reflected in the earlier changes made to the Program when it was reinstated. Others, such as the abolition of in-person file reviews and a clause permitting the use of polygraph results at file reviews, were new. The key components of the Guidelines are addressed in the excerpts from Mr. Kaufman's analysis, immediately below and need not be reproduced here.

Mr. Kaufman's comments on this period include the following:

Prior to the reinstatement of the Program, there was some recognition on the part of Government that there was a need to 'tighten up' the validation procedures for claims. It was also recognized that this would require added resources to enable the IIU and the assessors to respond to pre-existing claims, as well as new claims which would follow the Program's resumption. Consistent with this view, Mr. Barss proposed an expanded role for the IIU in the investigation of compensation claims.

The Program was reinstated only one month after it had been suspended. The additional resources needed to fulfill Barss' proposal were not in place. Further, there had been insufficient time for the IIU and the assessors even to 'catch up' on pre-existing claims. They had to cope with file reviews already scheduled to proceed, other pre-existing claims that had to be responded to, and the new claims which came forward. All of these were impediments to an effective investigative process. However, they were not the only ones.

In summary, time constraints and limited resources meant that, right from the outset, assessors and investigators struggled to meet the 120-day deadline and had to determine which investigations should be abandoned in the interests of time and resources. The Program was inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Some files continued to be assessed and sometimes reviewed without any interviews of available employees having been conducted. In other cases, telephone interviews only had been obtained, preventing their use during file reviews.

Even when employee statements later became available, the way in which they were used within the validation process was itself unsatisfactory. File assessors and reviewers struggled with how employee denials in writing could be used to resolve issues of credibility within the framework of the existing validation process.

Assessors and reviewers were taking positions as to whether abuse did or did occur without access to some of the most important evidence bearing on the claimant's veracity. Even where the written denials of employees were available, the file reviewers were placed in the position of weighing the testimony of claimants against written statements to the contrary. How could any validation process be regarded as fair and credible, given those parameters? The claimants' credibility was being measured by some reviewers against the findings of fact made by Mr. Stratton.

That is, the credibility of certain allegations made by claimants was enhanced because they conformed to findings that Mr. Stratton had made about what was transpiring generally. As I have earlier noted, Mr. Stratton did not contemplate that his qualified findings would substitute for validation of individual claims or be used for this purpose. Similarly, at least one file reviewer relied on the survivors' book of statements not merely to determine the appropriate category of monetary compensation, but as circumstantial proof of the truth of the claim under consideration.

Polygraph testing was introduced into the process. Considerable time was devoted by the Government to explore whether polygraph testing should be employed and, if so, how it should be done, by whom, and what weight should be placed on its results. Ultimately, the reliance on polygraph testing was incorporated into the November 1997 Guidelines. Although claimants were not compelled at any time to submit to such testing – nor should they have been – it is obvious to me that the IIU placed heavy reliance on the results of such testing. The fact that an employee had passed a polygraph test was even regarded as a basis for placing the claim against that employee on a list of fraudulent claims.

It is obvious that, as the Program continued, and the IIU heard from more and more employees, its investigators became increasingly sceptical about abuse claims generally. Stories about the exchange of information within correctional facilities no doubt heightened this scepticism. There were also serious concerns over new or different allegations coming forward after the compensation grid was published. All of this meant that claimants who were being interviewed by the IIU were being more thoroughly scrutinized.

Counsel for the claimants raised concerns over the way in which their clients were being interviewed by the IIU. These concerns persisted even after the RCMP and IIU signed a statement-taking protocol in April 1997. The protocol was supposed to minimize both the need for claimants to be interviewed more than once, and any adverse effect the IIU investigation might have on the concurrent criminal investigation. It became obvious to me during my review that, unfortunately, the relationship between the RCMP and the IIU, at times, did not advance these objectives. The protocol was often not followed in practice. Indeed, the RCMP felt that the IIU was undermining the conduct of the criminal investigation. At one point, the IIU complained that one of the reasons why the 120-day deadline could not be met was that they had to redo the RCMP 'pure version' statements. Interestingly, these statements were the subject of agreement in the protocol between the RCMP and IIU.

Those who were interviewed, whether claimants or employees, also had different perceptions on how the various agencies took statements. For example, a number of claimants found the Murphys to be sensitive to their victimization, in contrast to the IIU, who were regarded, at times, as accusatory. Some claimants were reinforced in this view by the fact that the IIU investigators *often knew them from prior encounters with the law. Many employees, on the other hand, regarded the IIU interviews initially as accusatory, but then as fair, even sympathetic, as the IIU became more knowledgeable about the claims. No one regarded the Murphys as accusatory, although the employees expressed concern about how the Stratton investigation was generally conducted.*

In my view, investigators must approach any interview in an open-minded way, free from stereotypical notions about abuse, claimants or employees. Although my recommendations later address this point more fully, I am of the view that the IIU may sometimes have allowed their preconceived notions about individual claimants or claims to unduly affect the way in which their interviews were conducted. Their perceptions may well have been correct about the merits of individual cases but, nonetheless, I must emphasize that interviews of claimants and employees should have been conducted in a completely open-minded way, without any preconceptions. This was not always done. In fairness, this reflected, in part, the IIU's understanding – which was correct – that the assessment and review process provided little or no opportunity to challenge the veracity of claimants. As such, the IIU may have felt that it was important to be pointed in their questioning of claimants.

A process that permitted the wholesale review of claimants' medical and other private records without regard to relevance violated the dignity and legitimate privacy interests of claimants and, of significance, is not even a requirement for parties to adversarial litigation. Finally, if the RCMP had conducted a video interview of a claimant, fairness required that, in the least, the IIU review that video before compelling that claimant to be re-interviewed. Even if additional questions were required, review of such a video should obviate the need to have the claimant re-describe each and every allegation, unless the object of the exercise is only to trap the claimant in inconsistencies. The latter approach is incompatible with a process that is intended to meet the needs and interests of true victims of abuse.

As is obvious from my comments throughout this Report, I am of the view that the Compensation Program was unfair to employees by failing to provide for a credible validation process that appropriately recognized the importance of hearing from them. But having said that, I also recognize that this process might have become unfair to true victims of abuse as well. As the IIU became increasingly sceptical about the majority of abuse claims, and recognized that there was not a forum for the employees' accounts to be fully considered within the Program, their interplay with claimants became more accusatorial, until the process became quite unfriendly not only for those whose claims were false, but also for true victims of abuse. The effect on true victims was, no doubt, compounded by the fact that the Program was originally designed very differently. As I have said elsewhere, claimants could justifiably regard the changes in the Program as a betrayal of the spirit and express terms of the original MOU, negotiated in good faith with the Government.

General dissatisfaction with the process – on the part of claimants and employees – prompted calls for a public inquiry. It was suggested in the briefing note Barss provided to the Premier's office that it was likely that a public inquiry would only confirm Mr. Stratton's findings or, alternatively, that the IIU could provide a comprehensive report that would quell the calls for such an inquiry. In my respectful view, whatever the merits of a public inquiry, which I later address in my recommendations, it could not reasonably be discarded because it was likely to confirm Mr. Stratton's findings – itself, a highly debatable proposition – or because the IIU could produce a substitute report. The very strength of a public inquiry rests on the fact that its findings are based on sworn evidence, with rights afforded to affected parties to cross-examine, tender evidence and make submissions, and upon the independence and impartiality of the presiding Commissioner, often a judge or former judge.

The Guidelines were introduced in November 1997. A number of its provisions did represent an improvement over what previously existed. It was fitting to articulate the burden of proof both for the Province and for file reviewers, and to make it the balance of probabilities. It was appropriate to reflect that where one groundless, implausible or deceitful allegation was made, the Province would draw an adverse inference in considering other allegations. Without purporting to speak to the precise amount of time that the Province should have been given to respond to claims, it was reasonable to further extend the time within which to respond and to reflect that complex cases or delays in obtaining material might justify even a longer response time.

Some of the Guidelines' provisions were less desirable. Although the Guidelines provide some protection against indiscriminate access to medical and other private records, a provision that permits access to such records "where they are needed to evaluate the Demand" provides insufficient protection to affected individuals.

I accept that there was a place for polygraph testing within the investigative process. I do not agree with the use of polygraph results, subject to exceptional circumstances, during the file review process itself, particularly given the fact that the subjects of the polygraph testing were not themselves witnesses. It was appropriate that claimants not be forced to take such tests.

The most significant change in the Guidelines limited file reviews to written submissions only. In my view, such an approach precluded the reviewers from properly assessing credibility, failed to recognize the desirability of permitting true victims of abuse to be heard, and ultimately undermined the credibility of the validation process itself. In stating that written reviews precluded the reviewers from properly assessing credibility, I refer not only to the opportunity to observe the witnesses (the importance of which can be overestimated), but the ability of the reviewer to question the claimant or clarify what it is that the claimant has to say.

COMPLETION OF THE PROGRAM (CHAPTER XII)

The Report describes the continuation of the Program, in the aftermath of the Guidelines.

The cost of the Government's response to reports of institutional abuse has been significant. Below I outline some of the known costs associated with the Compensation Program, as reported by the Department of Justice on November 30, 2001:

Salaries	$2,994,862
Other administration	$954,617
Awards to claimants	$30,006,485
Counselling	$7,607,167
Legal Fees	$4,573,794
Family Services Association	$1,440,596
Other Professional Services	$1,819,802
IIU	$7,686,485
Shelburne Employee Assistance Program	$4,002,997
Total	$61,086,805

Mr. Kaufman's analysis includes the following:

> *After the Guidelines were introduced, the validation of individual claims remained problematic. Some claims continued to be dealt with without any input from available employees against whom allegations were made. The polygraph continued to be used – not inappropriately – in the investigative process, but at times assumed undue prominence and substituted for a full and thorough inquiry. In fairness, this criticism should not be visited upon the investigators, given their limited resources and the time constraints associated with their tasks. The investigation of claims continued to reflect many of the shortcomings identified in Chapter XI.*
>
> *Claims that made their way to file reviews revealed serious flaws in the process. Two need to be elaborated upon here: the use of polygraph results and the abolition of in-person hearings.*

There was no consistency in approach by file reviewers to the use to be made of polygraph results. Some gave these results little or no weight, sometimes relying on their inadmissibility in court; others appeared to confer some weight upon the results.

In my view, this inconsistency reflected a larger failure of the Program to take adequate measures to ensure some consistency, both procedurally and substantively, in the approaches taken by file reviewers to their duties. Such measures, compatible with the independence of file reviewers, are outlined in Chapter XVIII.

However, the inconsistent approaches taken to polygraph results also reflected the inherent illogic of utilizing polygraph results to assess the credibility of individuals who had no opportunity to appear before, or be questioned by, the file reviewers.

Although the rationale for abolishing all in-person reviews was not clearly spelled out, it is obvious that the Government adopted this approach, in part, as a way of purportedly reconciling the inability of employees to attend file reviews with basic fairness. In other words, it was felt that the inability of employees to appear in person made the exclusion of claimants justifiable, while remaining true to the underlying objective that adversarial litigation be avoided. (Some also felt that the abolition of in-person hearings avoided unjustified appeal to emotion. I do not regard this as a valid reason to abolish in-person hearings.)

The decision to abolish in-person hearings was, with respect, unwise and inappropriate. First, an ADR process that excludes claimants, including true victims of abuse, from any right (if they so choose) to meet with the fact finders is likely to fail. It is incompatible with principles of respect for true victims, and their engagement in a process intended to provide them relief, which principles are fundamental to the success of any redress program. Indeed, an opportunity to be heard may be critical to the healing process for some abuse victims. I further address these and other such principles in Chapters XVII and XVIII of my Report.

Second, fairness for affected employees could be addressed by enabling them to appear before the file reviewers in a way that remained compatible with the desirability of avoiding unnecessary or gratuitous harm to true victims of abuse. I discuss how this can be done in Chapter XVIII. The claimants' lawyers themselves recognized this in their early proposals to the Government on how the Compensation Program could include a time-limited arbitration process.

With respect, it is inconceivable that employees would feel that the process had become fair because they were no longer the only parties who could not appear before the file reviewers to make their case. This is particularly so given their exclusion from the design of the process, their limited knowledge of what was happening within the Program or at file reviews, and the extensive awards *(and, they presumed, the findings) that had apparently already been made by these same file reviewers from the Program's inception. As well, although claimants could no longer appear in person before the file reviewers, their counsel (unlike counsel for the employees) continued to represent them at file reviews and make representations on the claimants' behalf. So as not to be misunderstood, this is not to say that an ADR process must include counsel for the employees – a position with which I do not agree – but only to say that the abolition of in-person reviews did not address the fairness problems intrinsic in the process, or even the appearance of unfairness.*

Third, the assessment of reliability and credibility should generally not be done through a paper review, or even a paper review supplemented by some videotaped interviews. There is a wealth of jurisprudence that establishes that triers of fact who have observed the witnesses are well situated, unlike appellate courts, to make findings of credibility. As a result, these findings are accorded great deference on appeal or judicial review.

Apart from these concerns, my examination of the file review process during the post-Guidelines period also revealed that file reviewers were, at times, confused or took fundamentally different approaches to how claims should be assessed within the regime of an ever-changing ADR process. It is true that the burden of proof was now explicit and provided some direction. Some file reviewers regarded this as a change; others saw it as confirmatory of what was implicit in the process itself. However, file reviewers continued to struggle with how assessments of credibility should be made, not only in light of their inability to observe the interested parties first hand, but also within an ADR regime whose mandate and philosophical perspective became unclear.

As the Compensation Program wound down, it left in its wake true victims of abuse and innocent employees, both victimized by its flawed approach to validation, and a public which could not know, and may never know, the nature and extent of abuse within the Province's youth facilities.

The Government's response also exacted a heavy financial toll upon the Province's coffers. I earlier cast doubt on the projections made by the Government of the costs of alternative responses. It is unnecessary, and probably impossible, for me to now quantify what reasonable, alternative responses would have cost. Suffice it to say, I am far from convinced that the Government's response could reasonably be regarded as having saved the Government money, when compared to alternative responses available. More to the point, I am satisfied that the human costs incurred by the Government's response, resulting in large measure from the lack of a credible, fair and legitimate validation process, cannot justify the response, whatever the financial savings might have been.

IMPACT OF THE COMPENSATION PROGRAM (CHAPTER XIII)

Mr. Kaufman's comments, in this regard, include the following:

Not surprisingly, many of those reading this Report will hold highly divergent, indeed polarized, views on the Government response and, in particular, on who was truly victimized by it. It is, therefore, important to say at once that the Program has left in its wake both claimants and employees who have been damaged by it. As I reflected earlier, my mandate does not permit me – nor did I have the means – to quantify how many claimants were truly abused or, on the other hand, how many employees were falsely implicated. I have no doubt that there were claimants who were truly subjected to physical and sexual abuse. Not even the most cynical observer of the Compensation Program can reasonably challenge that proposition. Similarly, I have no doubt that there was a significant number of employees who were falsely implicated.

One of the challenges of any Government response to reports of institutional abuse is to ensure that the lives of true victims of abuse are enhanced without, however, destroying innocent employees and their families. This requires balance, something the Nova Scotia response lacked. As stated elsewhere, the Government response was skewed against the employees to an extent that the innocent were deeply hurt, sometimes irreparably. Then, as the Government revised the Program, trying to provide some balance, true victims of abuse sometimes suffered.

The media coverage exacerbated the problems caused by the Program. It is not my role to pass judgment on which media accounts were accurate and fair and which were not. Nor do I intend to tell the media how to do their job. But it is important to stress that strongly held views by reporters and columnists, sometimes expressed in strong language, may have caused unnecessary hurt to people who were already viewed with suspicion, be they claimants or employees, past or present. Government, in designing and implementing a response to reports of institutional abuse, must appreciate the impact that the media have, and govern itself accordingly. This might mean, for example, that Government should repeatedly and effectively reiterate, in its public utterances, the presumption of innocence and the importance of avoiding premature judgments about individual employees or claimants.

THE MEMORANDUM OF AGREEMENT (CHAPTER XIV)

The final Memorandum of Agreement was signed on June 25, 1998. Once it was executed, the NSGEU withdrew its policy grievance.

The purpose of the MOA was to define the options available to employees against whom allegations of abuse were made within the mandate of the Internal Investigations Unit, but who were not discharged as a result of the IIU investigation. (The Interim Memorandum of Agreement continued to apply while the IIU investigation was ongoing). The MOA also outlined the procedures to be used in applying these options, and how disputes would be resolved.

Mr. Kaufman's analysis includes the following:

The impact of the process upon employees (and claimants) was earlier described. One aspect of that impact for current employees was the effect of allegations upon their ability to work either at their institutions or elsewhere. Some were disabled and rendered unable to work. Others were moved out of their institutions while awaiting the investigation of the allegations made against them. Yet another complaint registered against the Government by employees is that their employment status was dealt with by Government in inconsistent, sometimes arbitrary, ways. Some employees were sent home, while others similarly situated were permitted to remain at work. This meant to the outside world that some had already been adjudged to be guilty.

The [existing jurisprudence] reinforce[s] the duty of employers to act fairly to their employees, and the terrible anguish, humiliation, physical and mental distress suffered by employees against whom false allegations of criminality have been made. My mandate neither requires nor permits me to determine whether the legal rights of employees were violated to the point where the Government is liable to them for damages. What I am able to say is that the Government's response to reports of institutional abuse, most particularly the Compensation Program and its lack of a credible validation process, was unfair to employees. The fact that the settlements or awards were purportedly confidential and that the Government made no admissions of liability did not, in the context of the Nova Scotia situation, prevent individual employees and employees collectively from being prejudiced.

Further, the way in which the Government addressed the employment status of suspected abusers was also deeply problematic in at least two ways. First, as earlier indicated, similarly situated employees were sometimes dealt with inconsistently and arbitrarily. Second, the Government adopted a response that caused some employees to be kept 'in limbo' for years, to a point that some could never be reintegrated into the work environment, even if ultimately exonerated.

I have found that the Government's response was, at times, inappropriate, unreasonable and unfair to employees. Having said that, to its credit, the Government did recognize that measures had to be taken to address the impact of the process upon its employees. The interim and final Memoranda of Agreement represented well intentioned efforts on the part of the Government to ameliorate that impact. Given the pending litigation between some employees and the NSGEU, *earlier referred to, it would be unwise for me to decide whether the NSGEU should or should not have entered into the Memorandum of Agreement. For the purposes of my Report, I can only say that no Memorandum of Agreement would have been necessary had the Government's response been better designed and given greater prominence to the interests of its employees.*

THE IIU REPORT (CHAPTER XV)

In December 1999, the Internal Investigations Unit provided a Report to the Minister of Justice "regarding the investigation into allegations of abuse by former residents of Provincial youth facilities." The Report outlined the IIU's conclusions about the veracity and verifiability of the many claims of abuse levelled against both past and present employees of Shelburne, the Nova Scotia Residential Centre and the Nova Scotia Youth Training Centre. It was largely written by Frank Chambers, the IIU's Director at the time, and David Baker, a former file assessor with the Compensation Program, and it is therefore sometimes referred to as the "Chambers - Baker Report."

The IIU's basic conclusion is stated in an early chapter of the Report:

> To the best of our information and belief, neither credible nor reliable evidence exists to corroborate or substantiate the vast extent and severity of allegations made by adult complainants who were residents of institutions for the detention of juvenile delinquents/young offenders and other children, at about the time of the operation of the *Compensation Program* in about 1994-1999. The more that these allegations (including those made through the Stratton investigation) are strictly scrutinized according to the discovery of relevant information, the more that reasonable doubts are raised about their legitimacy. When assessed against the background of objective, confirmable information, most of the allegations are either unsustainable or implausible.

After Mr. Kaufman summarizes the controversy generated by the IIU Report, and the conflicting perspectives towards the report, he states:

Resolution of this debate – while no doubt of importance to the participants – does not advance the systemic focus of my review and, in any event, would require me to make findings which I am unable in law to make. After all, although there are 'process' issues associated with how and by whom this Report came to be written, the real debate is over its accuracy. Although it might be frustrating to some, I reiterate yet again that I am not in a position to determine the merits of individual claims of abuse or the prevalence of abuse generally.

That being said, I do, however, have some comments on the Report.

At times, undue emphasis is placed upon the failure to contemporaneously complain about abuse, given the institutional setting in which abuse allegedly occurred. The Report may be read as raising questions as to the guilt of MacDougall on some of the charges to which he pleaded guilty, a view I do not share. The Report, while appropriately raising concern about the possibility of collusion and about how providing the chart of compensable abuse to former residents could produce exaggerated claims, is careless about ascribing improper motives to some claimants' counsel. The evidence disclosed in the IIU Report did not support their conclusions in this regard.

My staff and I have reviewed much of the documentation referred to in the IIU Report and conducted many interviews. There is significant evidence, direct and circumstantial, that false and exaggerated claims were made to the Government, and that these claims were motivated by monetary awards being offered by the Program and the known absence of a true validation process. There is significant evidence that some individuals colluded in making false claims. Indeed, some individuals have admitted that they participated in making false claims or that they are aware of false or exaggerated claims made by others.

The IIU also assembled materials that attempted to correlate inmates who had made claims, when those claims were made, what those claims alleged and what, if any, connection there was between the inmates prior to their incarceration together. In the least, these materials demonstrated that the opportunity for collusion by a number of inmates was substantial.

Finally, I note here that there also appears to be significant evidence that some contemporaneous complaints made by residents, or statements previously provided to the RCMP and others, are incompatible with claims later advanced by the same individuals within the Compensation Program. Although I recognize – as I have noted elsewhere – that it would constitute stereotypical thinking to conclude that the absence of any contemporaneous complaint compels the conclusion that no abuse occurred, the discrepancies noted here, in the least, invite close scrutiny and, in some cases, scepticism, about some of the claims now advanced.

There remain very different perspectives on the extent to which abuse claims made to the Compensation Program are true of false. The IIU Report represents one of those perspectives. I am convinced that, with limited exceptions (for instance, where admissions had been made, criminal convictions have been registered or where reliable, corroborative evidence exists), it is now extremely difficult, if not impossible, to reconstruct what abuse did or did not occur within the institutions. In part, this is a function of the passage of time and the unavailability of some witnesses. But of most importance to my Report, it also reflects the shortcomings of a Government response that failed to appropriately consider and address the interplay between the Compensation Program and the criminal process. Our inability now to effectively sort out true and false claims of abuse does a disservice both to true victims of abuse and innocent employees.

Recommendations

The Report contains 105 recommendations. Many are accompanied by commentary which explains or refines the recommendations. The commentary is not reproduced below.

GENERAL CONSIDERATIONS IN DESIGNING A GOVERNMENT RESPONSE

1. A government response should respect those who were truly abused, engage them in the creation and implementation of any redress process, and offer them comprehensive information throughout so they can make informed choices about their participation in the process.

2. Where the government response involves monetary compensation for abuse and its effects, any validation process to determine whether, and in what circumstances, abuse occurred, must be credible and fair.

3. Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress.

4. A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must include procedural safeguards to protect against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.

5. A government response should strive to hold those who are responsible for abuse, if it occurred, accountable. Accountability extends to both abusers and those individuals, organizations or governments whose actions or inactions enabled abuse to occur. As noted by the Law Commission, these individuals may include "the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight."

6. A government response should strive to address the full range of needs of those who were truly abused. Those needs – for example, the need to see that perpetrators are held

accountable – will often not be exclusive to abuse victims, but coincide with the larger public or societal interest. The needs of abuse victims may be met, for example, by monetary compensation, counselling, education and retraining, medical or dental services, acknowledgments and apologies, and establishing a historical record of the abuse.

7. A government response must recognize and reconcile competing needs and interests. For example, the desirability that those victimized maintain their confidentiality may, at times, conflict with the societal need to prevent future abuse and prosecute the guilty. The desirability that the government adopt a process that does not compound the harm done to abuse victims may compete with the interest in ensuring that individuals are not falsely stigmatized as abusers. Ultimately, an appropriate balance must be struck.

8. A government response should strive to address the needs of the families and communities of true victims.

9. A government response, particularly where it involves a validation process, should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing.

10. A government response should be enduring. That is, it should complement what must follow. This means that, where abuse has occurred, the response should contribute to reconciliation and healing. Whether or not abuse has occurred, the response should recognize the need for its institutions to operate safely and effectively in the future. It should promote a healthy environment at the institutions, both for their residents and for those who work there.

11. A government response should strive to prevent abuse from occurring in the future and contribute to public education and awareness.

12. A government response should, itself, be transparent; that is, it should permit the public to understand and evaluate it. Government and its officials should also be accountable for its design and implementation. This means, in part, that elected officials must be fully and accurately informed as to the available options and then provide appropriate direction and input into the design and implementation of such a response.

13. A government response must be fiscally responsible.

14. A government response should build in, from the outset, mechanisms to permit ongoing assessment and improvement. However, a response should be designed to avoid, wherever possible, changes mid-stream that may compound the harm to those affected.

15. A multi-faceted government response must be integrated and coordinated. This means, in part, that government ministries, social or investigative agencies and others should not operate at cross-purposes, unnecessarily duplicate efforts or waste valuable resources.

16. A government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. Of paramount concern is that any government response not interfere with such proceedings. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings.

17. A government response should strive to ensure that individuals who are similarly situated be treated similarly. Generally, there should be consistency in the compensation awarded to similarly situated victims. There should be consistency in the interim measures taken by government respecting alleged abusers who are similarly situated. Put simply, arbitrary distinctions should not be drawn between the treatment of affected parties.

18. A government response should be designed to prevent discriminatory treatment of claimants based on race, ancestry, place of origin, colour and ethnic origin, gender, sexual orientation, or disability. Equally important, consideration need be given to how a government response can ensure inclusiveness, respect and engagement of all claimants. Such consideration may extend to many aspects of the government response: for example, consultation or partnership with representative community groups, the selection of program designers, administrators and fact finders, and the formation of claimant advocacy groups or joint advisory or implementation committees.

INITIAL RESPONSE TO REPORTS OF INSTITUTIONAL ABUSE

19. In general, the initial response by government to reported institutional abuse by an employee on a resident should include:

- **(a) documentation of the allegation;**
- **(b) absent exceptional circumstances, removal of the alleged abuser from the immediate environment;**

(c) relocation of the alleged victim(s) or witness(es), where a credible basis exists for believing that these individuals will otherwise not be secure or protected from employees or fellow residents;
(d) appropriate reporting within the institution and to the Ministry involved;
(e) fulfilment of any statutory reporting requirement;
(f) where the allegation involves criminality, referral to the appropriate law enforcement agency for investigation.

20. Policies, procedures or protocols ("policies") should exist to address all of these matters. As well, such policies should specifically articulate the obligation of all employees to intervene to protect residents from abuse.

21. Such policies should be created in advance rather than at the time of a crisis. They should be developed, where possible, after full consultation with affected parties. Employees should be fully educated and trained as to these policies. Institutions should ensure that residents are familiar with those policies that directly affect them.

THE INTERIM STATUS OF ALLEGED ABUSERS

22. Such policies should specifically address the status of current employees against whom allegations of abuse have been made, pending a determination as to whether abuse occurred. While the paramount consideration must be the safety and security of current residents, these policies should reflect a consistency of approach, procedural fairness to affected employees, recognition that no findings of abuse have been made, and sensitivity to the impact of allegations upon the affected employees.

23. In this context, 'abuse' includes, but may not be confined to, physical or sexual abuse. However, the term 'abuse' should not be so broadly interpreted as to trivialize its meaning and prevent the effective operation of the institution.

24. Generally, where physical or sexual abuse has been alleged against a current employee, that employee should not continue to work in the immediate environment in which the abuse allegations were made. This approach protects not only the residents, but also affected employees from false accusations.

25. Depending on the circumstances, removal from the immediate environment may involve re-assignment of the employee to other duties, suspension with pay, or, in limited

circumstances,[1] immediate termination. In determining which option to adopt, the government should not act arbitrarily. Similarly situated employees should be dealt with similarly. An employee's reassignment or employment status should generally be revisited upon completion of any police or children's aid society investigation, after any criminal charges are laid, after any criminal case is completed, and upon completion of any internal investigation.

26. Sensitivity to the impact of allegations upon affected employees means, in the least, that allegations be addressed discretely as circumstances permit and, where information pertaining to the allegations is disseminated, that the status of the allegations *as allegations only* be articulated. In particular, appropriate recognition must be given to the stigma visited on an employee by allegations of sexual or physical abuse.

POLICIES RESPECTING INTERNAL INVESTIGATIONS

27. Policies should specifically address how and when internal investigations of current employees are to be conducted and by whom. Such policies, which may be internal or joint policies shared with police, children's aid societies and others, should specifically address the interaction between internal and external investigations. Matters that should be addressed include:

(a) how an initial report of abuse should be received and recorded;
(b) the relative roles of police, children's aid societies and internal investigators in the investigation of abuse complaints;
(c) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of a resident's or witness' account;
(d) the assignment of investigators with specialized training and skills respecting abuse cases, and where applicable, sexual abuse cases;
(e) the desirability of early videotaping of interviews, subject to limited exceptions;
(f) procedures for videotaping, and retention and access to videotapes;
(g) medical examinations of the resident, where applicable;
(h) the exchange of information between the police, children's aid societies and the applicable institution and/or Ministry;
(i) the status of any internal investigation pending an ongoing children's aid society or police investigation, or criminal charges;
(j) when a support person will be permitted to remain with a resident or witness during interviews;

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[1] For example, where the employee admits the wrongdoing.

(k) the manner in which a suspected employee is notified that an allegation has been made against him or her;

(l) at what stage of the investigation should the suspected employee be given an opportunity to address the allegations, and what information should be provided to that employee and/or his or her counsel to enable them to address the allegations.

THE NATURE AND TIMING OF INTERNAL INVESTIGATIONS

28. Where criminal abuse is alleged, it should be investigated by the police, together with the local children's aid society, if the allegation falls within the society's mandate. *Generally*, any internal investigation should be deferred, pending conclusion of any ongoing or contemplated police investigation or resolution of any criminal charges.

29. Although an internal investigation should generally be deferred to await the completion of a criminal investigation, the decision by government as to whether an employee should be terminated or otherwise disciplined, and any disciplinary proceedings themselves, should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

30. A full internal investigation of allegations of sexual or physical abuse may be required where:

(a) no criminal investigation or prosecution is initiated;

(b) criminal charges are withdrawn, stayed or dismissed;

(c) further deferral of an internal investigation would irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

31. Any such internal investigation should be conducted by individuals with specialized training and skills respecting abuse cases and, where applicable, sexual abuse cases. This may mean that outside investigators need to be retained to conduct the investigation. Where the allegations are not isolated or raise systemic issues about the institution's conduct, outside investigators may also be desirable to foster independence.

32. Any such internal investigation should be mindful of the desirability of:

(a) avoiding or reducing trauma to a resident or any witness through unnecessary or inappropriate questioning;

(b) drawing upon pre-existing evidence, such as interviews already conducted by the police, where applicable;

(c) respecting the privacy interests of all affected parties, to the extent possible and as not incompatible with any statutory duty to report suspected abuse;

(d) ensuring fairness to any employee against whom a complaint has been made;

(e) ensuring an accurate determination, free from stereotypical notions about abuse, residents or employees.

33. No individuals should be provided with assurances of confidentiality that are incompatible with any statutory obligation to report suspected abuse and that potentially expose others to the risk of abuse in the future. The desire for confidentiality can, of course, be considered in the exercise of discretion as to how and whether further proceedings will be conducted.

34. In reporting and describing alleged abuse, residents should be made to feel that their accounts will not be summarily discounted or minimized because they are residents and their alleged abusers are employees. Employees should be made to feel that complaints will not simply be accepted at face value because they are made by young people.

PROTECTING RESIDENTS FROM ABUSE

35. Protecting residents from abuse includes protection from the adverse effects of abuse and of having disclosed that abuse. This means that Government should ensure that abused residents have access to appropriate support persons. An appropriate support person may also foster an environment more conducive to full disclosure. Policies should address both the availability of support persons and of counselling and therapy for those who allegedly were victims of institutional abuse.

AUDITS OF EXISTING POLICIES

36. An audit of existing policies, procedures and protocols represents one appropriate way in which government can ensure that current residents are protected from abuse. The audit should not amount to, or substitute for, an investigation of specific allegations of abuse. It should be conducted by a person with experience and training in the auditing of youth institutions and in best practices concerning policies, procedures and protocols pertaining to abuse and its reporting.

TRADITIONAL LITIGATION AND OTHER ALTERNATIVES

Avoidance of Speculative Myths, Stereotypes and Generalized Assumptions

37. When a government receives reports of institutional abuse, it must approach these reports in an open-minded way. Government must avoid "speculative myths, stereotypes and generalized assumptions"[2] surrounding the credibility of young people, abuse or its victims: for example, notions that young people are inherently unreliable, or that only claims contemporaneously voiced are likely to be true.

38. At the same time, government must not substitute equally untenable assumptions or stereotypes: for example, notions that those who allege abuse almost inevitably were abused, or that traditional indicia of unreliability (such as past criminality) have no relevance to abuse allegations. The perpetuation of myths, stereotypes and assumptions – on either side of the abuse issue – may skew an investigative process and lead to unwarranted conclusions that abuse did or did not occur. Similarly, such perpetuation may prevent government from formulating an objective, open-minded and credible response to reported institutional abuse.

39. Further, government must educate the public to recognize, and avoid, myths, stereotypes and assumptions. Although government must be alert to public opinion, it cannot be swept away by an uninformed public. In this regard, it must lead, not simply follow.

Credible Validation within Either Traditional Litigation or Redress Programs

40. Whether a government responds to reported institutional abuse within a litigation framework or through a special redress program, its response can only be credible if the validation of individual claims is itself credible.

41. Procedures required to validate an abuse allegation in a criminal or civil court room, where liability must be publicly determined, may not be required to validate such an allegation in an ADR process, whether conducted within a litigation framework or as part of a redress program. It is relevant that such a process may involve no binding findings of legal liability, may be confidential, and may not require that the alleged perpetrator contribute to any financial settlement or award. This permits *some* relaxation of the validation procedures, but not at the expense of basic accuracy, as well as fairness to all affected parties.

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[2] This phrase is taken from the Supreme Court of Canada's judgment in *R. v. Mills*, [1999] 3 S.C.R. 668; 139 C.C.C. (3d) 321.

THE MINIMUM REQUIREMENTS OF A CREDIBLE VALIDATION PROCESS

42. Where serious allegations of sexual or physical abuse have been made,[3] a credible validation process should generally involve, at a minimum, the following:

(a) proof under oath, affirmation or an equivalent;
(b) the opportunity to challenge the account given by the claimant;
(c) the opportunity for the parties to tender witnesses and documents supporting or challenging the claimant's account;
(d) the obligation for government to consider whether there is available evidence, including that of the alleged abuser, to challenge the claim. Where credible evidence is available, the government must consider tendering that evidence in support of its position. Generally, the alleged abuser should be given the opportunity to provide his or her account;
(e) fact finding by one or more independent adjudicators experienced in evaluating credibility and reliability for these or analogous types of claims;
(f) an appropriate burden of proof to validate a claim;
(g) rules for the mutual disclosure of documentation, consistent with the practice in civil actions, or otherwise as may be agreed upon.

43. Generally, a validation process should not rely upon a written record only. An oral hearing provides the fact finder(s) with an opportunity to assess the credibility or reliability of the witnesses, including the claimant. It facilitates any challenge to that evidence. As well, as the Law Commission noted, it provides an opportunity for claimants to describe directly in their own words the abuse they allegedly suffered and the impact it had on their lives. This can, itself, have a therapeutic value and contribute to the sense of respect and engagement that should be felt by claimants.

ACCOMMODATIONS WITHIN A CREDIBLE VALIDATION PROCESS

44. A credible, fair and accurate validation process can accommodate the needs and interests of affected parties, including true victims of abuse, in ways that include the following:

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[3] As earlier noted, I need not address claims that are not dependent upon allegations of abuse specific to the claimant, but rather conditions or circumstances applicable to all residents – for example, a claim that residential schools for aboriginal children deprived them of their culture, families and language. If it were determined that such claims are compensable (which I gather is not the position of the federal government), validation would only require proof that the claimant attended the institution for a particular period of time. To be clear, I express no opinion on whether such claims are properly compensable.

(a) it may be conducted in private;

(b) it may provide for the disposition of documents, transcripts and notes following the completion of the validation process;

(c) it may impose limitations upon access to confidential records, consistent with the principles enunciated by the Supreme Court of Canada in *R. v. O'Connor*[4] and analogous legislation;

(d) it may permit the presence of a support person during the claimant's testimony or at other times during the process;

(e) it may limit the number of persons attending the fact finding hearing;

(f) it may provide for an informal hearing room and other physical arrangements to minimize the adverse effects of the process;

(g) it may limit the right of opposing counsel to cross-examine the claimant, provided that questioning can be directed to the claimant through the fact finder;

(h) it may provide for arrangements to prevent a face-to-face encounter between the claimant and the alleged abuser, except where necessary to establish identity;

(i) it may require undertakings signed by participants as to confidentiality, where not inconsistent with statutory obligations;

(j) it may provide for evidence to be taken by video-conferencing or other comparable means;

(k) it may allow claimants or analogous witnesses to adopt prior videotaped statements as their account, thereby reducing the need to fully recount their alleged victimization.

(l) it may establish rules to encourage timely admissions of fact, and excuse witnesses from having to recount facts that have been agreed upon.

PRIOR VALIDATION OF ABUSE

45. Credible validation may be established through findings made in judicial proceedings or administrative hearings to which the alleged abuser was a party.

46. Where a trial judge has found in a criminal case that the complainant or other witness at trial has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded. Such findings may be found in reasons for conviction or sentence or may be implicit in the verdict rendered.

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[4] [1995] 4 S.C.R. 411; 89 C.C.C. (3d) 109.

47. Where a finding that the complainant has been abused by a government employee is implicit in a jury's verdict of guilt in a criminal case, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

48. Where an adjudicator has determined, on a balance of probabilities, that the complainant or a witness has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

49. Absent exceptional circumstances, such as the availability of fresh evidence that casts serious doubt upon the earlier findings of fact, government should not compel such complainants or witnesses to re-prove their own victimization for the purpose of obtaining compensation or other redress.

50. Where prior judicial or administrative findings obviate the need for further validation, government should strive to resolve outstanding issues in a way that does not compound the impact of abuse upon the complainants or witnesses. Non-adversarial means should be resorted to wherever possible.

LOWER VALIDATION REQUIREMENTS

Once Abuse Has Been Validated

51. (1) The validation requirements, earlier outlined, pertain to proof of the abuse alleged. Once abuse has been validated, an ADR process can be designed to facilitate the determination of what impact that abuse had, and what benefits should be conferred upon, the validated claimant.

(2) Given the diminished interest that employees have in these determinations, as opposed to a determination whether abuse occurred, a program is entitled to design a process that better accommodates a validated claimant, and further minimizes any potential harm from the process itself.

Where Allegations Do Not Involve Criminality

52. Where allegations involve non-criminal conduct or conduct regarded as acceptable when it occurred, validation may be less important, since the prejudice to those against whom these allegations are made is less palpable.

Where Counselling or Therapy is Sought

53. Interim counselling may be provided immediately to claimants, without true validation of the merits of their claims.

54. A program may provide long-term counselling to claimants, either as part of a larger redress package which includes monetary compensation, or on its own. A free-standing program which only awards counselling or therapy (or related non-monetary benefits) may reasonably do so without true validation of any claimed abuse.

DETERMINING WHEN TO ADOPT A REDRESS PROGRAM

Relevant Considerations

55. In determining whether a redress program should be adopted, rejected or deferred, the following should be considered:

- (a) the extent to which widespread or systemic abuse is involved;
- (b) the status of criminal proceedings;
- (c) the extent to which current employees are allegedly involved;
- (d) the needs and interests of true victims of abuse;
- (e) whether a redress program is fiscally responsible. This will depend, in part, on whether the government can credibly determine the likely outside limits of its financial exposure to potential claims.

Widespread or Systemic Abuse

56. Widespread or systemic abuse is not adequately addressed solely through the criminal process or may not be adequately addressed through civil actions brought by individual complainants against government or their alleged abusers. Where a credible basis exists for believing that widespread or systemic abuse has occurred, a redress program may reasonably form part of a government response.

57. An evidentiary foundation for widespread or systemic abuse may be derived from all or any of the following:

(a) prior criminal proceedings;
(b) prior administrative proceedings;
(c) a public inquiry;
(d) a police investigation;
(e) an independent investigation specifically mandated to address this issue.

58. Generally, an independent investigation is not a preferred approach. It should only be undertaken, and relied upon, if:

(a) no specific 'findings' of abuse are made;
(b) its limited objectives are explained by government to the public;
(b) the investigation is not viewed as a substitute for a credible, fair and accurate validation process to evaluate individual claims;
(c) the way in which it is conducted does not interfere with, or compromise, any existing or contemplated criminal investigation or prosecution; and
(d) it is conducted as part of an ongoing criminal investigation, or otherwise, with the assistance of investigators with specialized skills and training.

The Status of Criminal Proceedings

The Extent to which Current Employees are Allegedly Involved

59. Generally, though not invariably, the investigation and validation of claims for compensation should be deferred to await the completion of related criminal investigations or prosecutions. In this context, the appropriate balancing of interests may not require that such deferral await the completion of any appellate criminal proceedings.

Fiscal Responsibility

60. Government should generally not commit itself to a redress program unless it is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims.

61. Government may determine, on a credible basis, the likely outside financial exposure to potential claims in a variety of ways:

(a) the subject institutions may encompass a finite and limited number of potential claimants;
(b) by providing a deadline for the submission of notices of intended claims that predates a final determination of the precise components of the redress program;
(c) by limiting the program, at least on a pilot basis, to a specific institution, specific years, specific age groups or other limiting criteria.

Balancing the Relevant Considerations

62. Where

(a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
(b) no related criminal investigations or prosecutions exist or are contemplated, or such proceedings have been completed, and
(c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government to address reports of institutional abuse.

63. Where

(a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
(b) related criminal investigations or prosecutions *do exist or are contemplated*, and
(c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government, provided that:

(d) counselling or therapy is immediately available to claimants, without true validation of their claims, and
(e) claims are processed in an expeditious way, once related criminal investigations or prosecutions relating to that claimant are completed.

INVESTIGATIONS TO VALIDATE ABUSE FOR COMPENSATION PURPOSES

64. The preceding Recommendations that govern the conduct of internal disciplinary investigations, particularly Recommendations 32 to 34, have equal application to investigations conducted to validate claims of abuse for the purposes of compensation or redress.

ACCOMMODATION WITHIN A LITIGATION FRAMEWORK

65. Where government chooses to respond to reported institutional abuse within a litigation framework, consideration should be given to how government litigators can accommodate and show sensitivity to the interests and needs of plaintiffs, who may be true victims of abuse, even while testing the veracity of their claims.

RANGE OF BENEFITS AVAILABLE TO REDRESS PROGRAMS

66. It is appropriate for redress programs to offer some or all of the following benefits:

(a) monetary compensation;
(b) financial or debt counselling;
(c) psychological counselling or therapy;
(d) treatment facilities, such as may be provided at alcohol and drug rehabilitation centres;
(e) literacy training, educational upgrading or vocational training and rehabilitation;
(f) educational or vocational assessments and counselling;
(g) medical or dental services that either remove vestiges of a claimants' prior incarceration, such as tattoos, relate to the consequences of institutional abuse or mistreatment, or otherwise affect the claimants' emotional well-being;
(h) payment of miscellaneous expenses, such as child care, transportation, computer and textbook costs, to enable claimants to obtain many of the above benefits;
(i) an acknowledgment and apology, made publicly to survivors generally, privately to validated claimants, or both;
(j) a telephone crisis line;
(k) a historical record of abuse. The contents of, and access to, such a historical record must remain consistent with the fairness to be accorded to alleged abusers who may face criminal or disciplinary proceedings;
(l) a memorial;
(m) programs, actions or commitments that the government may undertake or foster which may provide benefits to survivors or the public generally, such as

legislative, policy or research initiatives, public education or the establishment of a healing centre or healing fund to be administered by the community.

MONETARY COMPENSATION

Compensation Grid

67. **A compensation grid is one valid way to promote greater certainty and consistency in the monetary awards given to validated claimants. However, any program must recognize that there is no necessary connection between the nature, severity and duration of abuse, and the impact of that abuse upon its victims. It follows that monetary and non-monetary benefits should not be solely dependent upon the nature, severity and duration of abuse.**

Monetary ceilings

68. **A redress program should be designed to fairly compensate true victims of abuse, but remain mindful of the overall benefits offered by a redress program and the ways in which the needs of the claimant are better served through this program. It should also not be so generous as to provide an overly powerful incentive to the making of false or exaggerated claims.**

Periodic Payments v. Lump Sums

69. **A redress program may validly be designed either to provide monetary compensation through lump sum payments, periodic payments or a combination of the two. The needs of validated claimants must figure prominently in the determination as to how monetary compensation is to be paid.**

70. **Given that the needs of validated claimants will differ, any redress program that presumptively provides monetary compensation through periodic payments should have the flexibility to accommodate the specific needs of individual claimants.**

71. **It is generally preferable that discretion in individual cases as to the way in which monetary compensation will be awarded not be exercised solely by government officials.**

COUNSELLING

72. **It is generally preferable that a redress program not simply pay money to a claimant in the expectation that it will be used for counselling or therapy. Instead, the program may pay service providers directly or through a fund, administered by a designated committee or group.**

73. A redress program may reasonably impose a maximum monetary value on the amount of counselling or therapy which may be obtained. It may also reasonably impose a time frame within which eligible counselling or therapy may be obtained. However, such a program should specifically provide a mechanism for relieving against these restrictions, based upon demonstrated need.

74. The discretion whether to relieve against restrictions on counselling or therapy should generally not be exercised by government officials alone, but rather by an advisory or implementation committee, including representatives of government and claimants.

75. A redress program can establish accreditation for eligible counsellors or therapists.

ADDITIONAL NON-MONETARY BENEFITS

76. (1) As earlier indicated, a redress program can provide for a variety of non-monetary benefits to validated claimants, such as educational, vocational or financial counselling, and medical or dental services.

(2) It is again generally preferable that a program not simply pay money to a claimant in the expectation that it will be used for such non-monetary benefits. Instead, the program may pay service providers directly or through an administered fund.

(3) Here too, determinations can be made by an advisory or implementation committee. A fund can be created to be administered by such a committee. As well, a fixed maximum sum may be designated as the amount that might be made available to individual claimants.

ACKNOWLEDGEMENTS AND APOLOGIES

77. A public apology made on behalf of government to abuse survivors, and apologies privately made to individual survivors, promote reconciliation and healing. It follows that such apologies may appropriately form part of a redress program.

78. The timing and the content of apologies, whether publicly made to survivors generally or privately made to individuals, should be mindful of outstanding disputes over the validity of claims of abuse.

79. Alternatively, a public apology should expressly recognize that:

(a) some true victims of abuse have been identified and are therefore appropriately recipients of an apology from government at this time;

(b) the apology should not be regarded as an indication of the merits of any individual claims of abuse that remain outstanding.

BENEFICIARIES OF A REDRESS PROGRAM

80. Benefits may be restricted to those who were actually abused. Alternatively, they may be extended to their families, to those who have been adversely affected by the victims' destructive behaviour, or to witnesses adversely affected by abuse.

81. Generally, monetary compensation should be restricted to those who were actually abused. However, counselling or therapy may appropriately be extended to family members, particularly since such counselling may reasonably be expected to have a salutary impact on the victims themselves, as well as their families and communities.

CONDUCT ATTRACTING REDRESS

82. The breadth of compensable conduct is, ultimately, negotiable. However, some factors upon which this determination might be made include:

(a) the evidentiary foundation for the conduct under consideration. For example, where there is extensive evidence of physical, but not sexual, abuse, it might be preferable to address only the former within a specially designed redress program;

(b) the fiscal implications of such a determination;

(c) how interrelated the types of abuse are. It may be impractical to separate out factually interconnected abuse into compensable and non-compensable categories;

(d) the likelihood of facilitating an advocacy group for claimants: the more diverse the potential claimants, the less likely that they can speak with one voice;

(e) the extent to which the different types of abuse generate significantly different issues;

(f) the extent to which physical abuse is alleged to represent conduct which was lawful when it occurred. If this is to be regarded as compensable, it raises very different issues than conduct that was criminal when committed.

PROCESS ISSUES

The Administration of a Redress Program

83. Generally, government should retain responsibility for administering a program it is funding. Accountability to the public and fiscal responsibility make this approach an appropriate one. However, the concerns about a perception of conflict of interest can be addressed through the creation of an advisory body containing representatives of government and victims to address issues that arise in the administration in the program. Such a body should not address the merits of individual cases.

Informed Decisions

84. Potential claimants should be informed about available options in an understandable and thorough way.

85. Information should be disseminated about available options in a way that does not compel former residents to disclose their background to their families or friends.

86. This generally means that the media represents the best way to initially inform potential claimants about available options. Press releases, public announcements and advertisements need not be comprehensive, but merely alert the public as to how to initiate contact to learn more about the process.

87. Any agreement governing a redress program should be written, to the extent possible, in plain language or non-legalistic terms.

88. The formation of a claimant advocacy group greatly facilitates the creation and implementation of a successful redress agreement. It may provide a single point of access to claimants. It is capable of giving claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct involvement of such advocacy groups with government promotes a degree of trust, and facilitates reconciliation and healing. It also gives a sense of empowerment to the claimants.

89. Government should facilitate the formation of such claimant advocacy groups and their involvement in the creation and implementation of redress agreements. This should often include financial assistance, both to enable such groups to form, and to communicate with and offer support to their constituency. This should often also include financial assistance for legal counsel to advise and represent the group.

90. Where a redress program is under consideration, multiple claimants may have already retained their own counsel to advance potential lawsuits. It must be recognized that these claimants are fully entitled to pursue lawsuits, with the assistance of counsel. However, it may best serve the needs of claimants generally that their interests be pursued collectively, with greater prominence given to their advocacy group.

Consultation with Affected Groups

91. Where the government contemplates that its response to reports of institutional abuse may involve alternatives to traditional litigation, it should broadly consult with potentially affected groups to obtain input on the design of that response.

Relinquishing the Right to Sue

92. Generally, a redress program should require that claimants relinquish their right to sue the government as a condition of their participation in the program.

93. A redress program may provide that this right be relinquished at various stages in the process:

(a) upon filing a demand or claim for compensation within the program;
(b) when the demand or claim is submitted for an initial assessment as to whether it will be permitted to be processed within the program;
(c) when the claim is submitted to a fact finder for binding determination.

94. The point at which the right to sue will be relinquished is appropriately the subject of negotiation between the parties. It may be dependent upon many considerations. However, a program that permits opting out after issues of credibility have been determined or after the amount of compensation has been fixed will lack credibility, waste resources, and fail to promote public acceptance of the process.

Dispute Resolution

95. An agreement governing a redress program should specifically address how disputes over its interpretation or generally in the implementation of the program are to be resolved.

The Deadline for Filing a Claim

96. In setting the deadline for filing a claim for compensation to a redress program, consideration should be given to:

(a) the extent to which there are difficulties in making the program known to former residents;
(b) the recognition that former residents may no longer be in the jurisdiction;
(c) the recognition that true abuse victims may find it emotionally challenging to respond, may be at different stages in their personal recovery and, as a result, may require time and support in order to participate in a redress program;
(d) the desirability that government ascertain the scope of the potential program before proceeding;
(e) the potential number of claimants involved;
(f) the desirability that the redress program not be unduly delayed;
(g) the desirability of reducing the potential for collusion or contamination of claims.

Promoting Consistency in Fact finding

97. A program may reasonably provide for processes that promote procedural and substantive consistency on the part of fact finders, without compromising their independence. Such processes may include:

(a) creation of a template by fact finders for their written reasons;
(b) informal review of fellow fact finders' draft reasons by a designated fact finder, or by the full panel of fact finders;
(c) group meetings of fact finders to review the procedures that govern fact finding sessions, and the decisions that have been rendered.

Training for Those Conducting or Administering a Process

98. Those involved in the design, administration or implementation of government responses to reported institutional abuse should, by prior experience or training, have an understanding not only of institutional abuse but, where applicable, of how credibility and reliability are to be assessed, free from speculative myths, stereotypes and generalized assumptions. Their experience and training should enable them to show sensitivity to the vulnerability of true victims of abuse, while remaining open-minded about the issues in dispute in a way that is compatible with a credible and fair program.

99. All or some of the fact finders should have specific experience and training pertaining to discriminatory treatment based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability.

100. It may be appropriate that the experience and training of those involved in a government response should be supplemented by training specific to the redress program. Some programs will compel specialized experience or training.

101. The nature and contents of this training should be the subject of discussions among those who participate in the creation of the redress program.

102. Such training should extend to administrators of the program, those within government who may be mandated to initially vet claims, those who investigate claims and, ultimately, the fact finders.

103. Prior experience and training of fact finders in analogous areas will often be desirable and appropriate. For example, members of a criminal injuries compensation board, former members of the judiciary, human rights or personal injury claims adjudicators, are examples of individuals who are generally well situated, by experience and training, to address these issues. Legal training is generally desirable.

Appellate Review

104. Generally, determinations made by the fact finder(s) within a redress program should be final. The goals and rationale of a redress program are largely incompatible with an appellate process. A program may or may not provide for limited review to address jurisdictional error. Some limited mechanism may also be created to revisit decisions based on the availability of fresh evidence. However, there should be a high evidentiary threshold to overcome before a decision should be revisited. Demonstrable fraud may suffice, as may the availability of new evidence which could not have been discovered through the exercise of due diligence by the party seeking to tender the documentation.

Evaluation of the Government Response

105. A redress program should provide for its own evaluation by participants. This enables government in particular to assess the merits of such a program in the future and to correct any identified flaws in any future programs.

Conclusion

The Commissioner concluded his Report in these terms:

> I end this Report where it began. Central to the Government's response to reported institutional abuse was a Compensation Program. It was seriously flawed. So flawed that it left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, innocent employees who have been branded as abusers, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia.
>
> I was to determine whether the Government response was appropriate, fair and reasonable. The simple answer is that it was not. It was commendable that Government was concerned about the plight of abuse victims and understood its obligation to rectify past wrongs and prevent future wrongs. However, it lost sight of its obligation to its own former and current employees. And fairness became yet another victim. And so did the credibility of the Program itself.
>
> As Government recognized – albeit imperfectly – the flaws in its own Program, some changes were introduced. But the changes did not rectify the basic unfairness of the Program and, ironically enough, were at times unfair to those whom the Program was designed to help – the true victims of abuse.
>
> It would be all too easy to find malevolence in a Government response so flawed. No doubt, some affected parties have formed their own conclusions in this regard. But every tragedy does not have a villain. The issues that confronted Government were not always free from difficulty. Nor was every Government official committed to, or equally responsible, for this flawed Program. The challenge here is to learn from the mistakes made and to avoid their repetition.
>
> I have crafted 105 recommendations – a 'Blueprint for the Future.' This is somewhat of a misnomer, since there is no single blueprint that should dictate how Government should or can respond to reports of institutional abuse. However, I am hopeful that the concerns that motivate my recommendations may find expression in the approaches taken by this and other governments in the future.

Searching for Justice

An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse

VOLUME ONE

The Honourable
Fred Kaufman, C.M., Q.C., D.C.L.

January 2002

Searching for Justice An Independent Review of Nova Scotia's
Response to Reports of Institutional Abuse - Volume One

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January 25, 2002.

The Honourable Michael Baker
Minister of Justice and Attorney General
5151 Terminal Road
P.O. Box 7
Halifax, N.S.
B3J 2L6

Dear Minister:

Re: Independent Review of Nova Scotia's Response to Reports of Institutional Abuse

Pursuant to the Terms of Reference issued by you on November 26, 1999, I have the honour to present to you my Report in the above matter.

Sincerely yours,

FRED KAUFMAN

Acknowledgements

No review of this scope and nature can be accomplished without the input, help and dedication of a devoted group of people. I was fortunate to have such a group.

Duncan R. Beveridge, Q.C., a seasoned and highly-respected Halifax counsel, accepted my invitation to be Senior Counsel to the Review. Duncan and I had worked together before, and I knew that any task entrusted to him would be carried out with skill, delicacy, and total thoroughness, and so it was. Mark J. Sandler, a prominent Toronto barrister, became my Senior Policy Advisor. As was the case with Duncan, this was not the first time that Mark and I had joined forces in a major undertaking, and I knew that he would approach the task ahead with exquisite skill, dedication and his usual enthusiasm. When I first approached him, he was in the final stages of acting as counsel to the Honourable Sydney L. Robins, who chaired a review "to identify and prevent sexual misconduct in Ontario Schools." Mark's experience in that position was of great value to this review, and this is reflected in the Report.

Christopher J. Sherrin, one of Mark's associates, was a tower of strength in the final stages of the review. He worked long and hard on successive drafts and I appreciate his dedication. Andrea Tuck-Jackson, Mark's partner, took time off her heavy schedule to read the final draft and make many helpful suggestions. Her input makes this a better document.

Seetal Sunga, an Ontario lawyer then in Halifax to complete a Master's degree in law at Dalhousie University, acted as Director of Research. She was assisted by Drago Vidovic, also a graduate of the Dalhousie Master of Law program. Their contribution was of great value to me, my counsel and my senior policy advisor. Faizal R. Mirza, then a student-at-law at Osgoode Hall in Toronto, also assisted in assembling and summarizing some of the documentation.

This was a small but highly effective group, and I thank them for their assistance, loyalty and devotion. It was truly a team effort, but the ultimate responsibility is, of course, mine.

To fulfill my mandate, my staff or I met with over 100 individuals. These included persons involved in the design and implementation of the Government's response, Ministers and Deputy Ministers, internal investigators and their staff, police officers, therapists, Dr. Elsie Blake of the Family Services Association, file assessors, administrators, former Chief Justice Stratton and Ms. Viki Samuels-Stewart. Written feedback was also received from a number of file reviewers. I am indebted to them all for their cooperation throughout.

Voluminous documentation had to be obtained, particularly from the Government. Nova Scotia officials were forthcoming and helpful, and no request for information – and there were many

– went unanswered. I am also grateful for the information provided to this review by officials in Newfoundland, New Brunswick, Ontario, British Columbia, and with the Federal Government and Law Commission of Canada.

I wish to especially acknowledge the former and current employees, as well as former residents of the youth facilities, with whom I met. I know that many found it painful to discuss the intimate details of their lives with me and my staff, and I am particularly grateful to them for having agreed to do so. Their contribution was extremely important to the content of this Report.

A number of counsel met with me or my staff and prepared written submissions for my assistance on behalf of the former residents, former and current employees, the Nova Scotia Government Employees Union and the Department of Justice. They were unfailingly courteous and of assistance to me in my task.

Last, but by no means least, I thank my wife Donna, whose love, encouragement and understanding give me much comfort and strength.

Chronology of Major Events

1991	
January	The RCMP begin investigations at Shelburne and the Nova Scotia School for Girls, which ultimately lead to criminal charges against Patrick MacDougall, George Moss and Douglas Hollett.
1992	
Oct. 9	Moss pleads guilty to four counts of indecent assault on a female and is sentenced to imprisonment for one year.
Nov. 26	Hollett is found guilty of having had sexual intercourse with a female person 14 to 16 years of age of previous chaste character.
1993	
Feb. 5	Hollett is sentenced to imprisonment for two years and four months.
Feb. 17	Patrick MacDougall is convicted of six charges relating to sexual abuse of five former residents of Shelburne.
Feb. 23	G.B.R. gives notice of an intended action against the Government of Nova Scotia and Douglas Hollett, alleging that Hollett had helped her escape from the School for Girls and then kept her in his house for over a year, engaging in sexual intercourse with her.
March 29	MacDougall is sentenced to a total of six years in the penitentiary.
July 6	MacDougall pleads guilty to five further charges relating to sexual abuse of five other residents of Shelburne. He is sentenced to a total of five years, consecutive to the sentences imposed on him on March 29.
	G.B.R. (the complainant in the case against Hollett) commences an action against the Government of Nova Scotia and Douglas Hollett.
July 30	Complainants from the Moss prosecution commence an action against the Government of Nova Scotia.
Sept. 27	Martha Crowe, legislative/policy consultant for the Department of Community Services, suggests to Reinhold Endres, Q.C., Director of Civil Litigation in the Department of Justice, that where staff have been convicted and civil actions are commenced against the Government, there should be an objective mechanism for evaluating the claims and compensation should be paid without litigation.

Oct. 5	Mr. Endres advises Ms. Crowe that the Department of Justice might put itself at a disadvantage by settling cases too early.
Oct. 25	Thomas C. Marshal, Q.C., General Counsel with the Ministry of the Attorney General of Ontario, sends information to the office of the Minister of Justice of Nova Scotia about non-traditional responses to allegations of abuse in government-run institutions.
1994	
April 21	A draft memorandum entitled "Compensatory Scheme for Victims of Physical and Sexual Abuse Perpetrated by Former Staff of the Department of Community Services" is sent by Ms. Crowe to Douglas J. Keefe, Executive Director of the Department of Justice, for possible submission to the Planning and Priorities Committee of Cabinet ("P&P"). It outlines four options to deal with civil cases arising from abuse.
Aug. 29	Dr. Patricia Ripley, Deputy Minister, Department of Community Services, sends a memorandum to the Deputy Minister, Department of Justice, suggesting that the focus in abuse cases should not be on legal liability, but rather on an appropriate compensation package.
Sept. 30	The Minister of Justice submits a memorandum to P&P outlining three options to deal with cases of abuse, and recommends the third. It involves an investigation, an audit of the institutions and an alternative dispute resolution process ("ADR") if liability is revealed by the investigation.
Oct. 6	P&P approves the recommended option.
Oct. 25	The Minister of Justice recommends to the Executive Council ("Cabinet") that he be authorized to initiate an audit of present practices at Shelburne and an independent investigation into allegations of abuse at that institution.
Oct. 27	Cabinet approves the proposal to initiate an audit of present practices at Shelburne and an independent investigation.
Nov. 2	The Minister of Justice announces in the House of Assembly the Government's response to incidents of sexual abuse at Shelburne. It is a three-step process: an audit, an independent investigation and, if liability is revealed, an ADR program to determine appropriate compensation. He also announces the appointment of Viki Samuels-Stewart to conduct the audit.
Nov. 7	At the request of the Minister of Community Services, the proposed investigation will be expanded to include all residential facilities operated by the Department of Community Services.

Dec. 1	The Minister of Justice announces the appointment of the former Chief Justice of New Brunswick, the Honourable Stuart G. Stratton, Q.C., to conduct the investigation.
1995	
Jan. 6	Alison W. Scott, senior counsel in the Department of Justice, submits a memorandum to the Minister of Justice setting out processes available, both within and outside the judicial system, to deal with claims for compensation.
Jan. 27	William Belliveau, a counsellor at Shelburne, commits suicide a day after being notified that an allegation of sexual abuse has been made against him. (He is posthumously cleared of the allegation.)
March 17	Viki Samuels-Stewart reports the results of her audit to the Minister of Justice. She concludes that young offenders held at Shelburne and at Waterville are victims of abuse.
March 29	The Samuels-Stewart Report is released to the public.
April 28	In a memorandum to the Minister of Justice, Mr. Keefe outlines a compensation process where the Government would work with victims and their lawyers to establish a framework of healing and settlement. He suggests that a working group be established to develop a strategy following the release of the Stratton Report.
June 22	Paula Simon, Director of Victims Services in the Department of Justice, prepares a memorandum for the Minister of Justice. She is critical of the New Brunswick and Newfoundland approaches, but is complimentary of the approach taken in Ontario. She identifies four options and estimates the cost of each.
June 30	Mr. Stratton submits his Report, which is made public. It identifies 89 victims of physical and/or sexual abuse.
July 6	Cabinet approves a plan submitted by the Minister of Justice to provide emergency counselling to victims and to put in place an ADR program to compensate them.
July 17	The Minister of Justice signs an agreement with the Family Services Association ("FSA") who will develop and administer a counselling service for victims of abuse FSA will also investigate the possibility of forming a survivors' group for the purpose of negotiating appropriate compensation.
July 20	The agreement reached with FSA is announced to the public. At a press conference, the Minister of Justice outlines the ADR option approved by Cabinet.

July 25	Judgment is given in favour of G.B.R. in her case against the Province and Douglas Hollett, awarding damages of $50,000 for pain and suffering and $25,000 for aggravated damages. No punitive damages are awarded. (This is subsequently varied by the Nova Scotia Court of Appeal which strikes the award for aggravated damages, but awards $35,000 for punitive damages.)
Aug. 11	A group of 15 lawyers representing 65 claimants notify the Minister of Justice that the Government's proposal which contemplates a single lawyer negotiating on behalf of a survivors' advocacy group is unacceptable. An advocacy group of lawyers is formed to negotiate with the Government.
Oct. 2	The Deputy Minister of Justice announces the appointment of four persons to conduct an internal investigation into the conduct of employees.
Oct. 17	The Minister of Justice announces the formation of an Internal Investigation Unit ("IIU").

1996

Jan.-April	Government representatives and lawyers for survivors hold seven meetings to hammer out an agreement.
Jan. 8	An Interdepartmental Committee on Institutional Abuse is established to develop a policy on the protection of children and to examine how current services provided by the Province can be included in a compensation package.
Jan. 29	FSA retains Anne Derrick to represent survivors of institutional abuse who had not yet engaged, or had discharged, counsel, but who wanted to participate in the compensation process.
Feb. 13	Faced with a rapidly increasing number of claims, Paula Simon, the administrator of the compensation program, recommends that the budget allocation be increased.
March 7	The RCMP ("Operation Hope") states that their investigation has so far identified 410 victims and 206 suspects.
March 21	Cabinet adopts a proposal by the Minister of Justice that the ADR process move forward. A new budget of $33.3 million is approved.
April 20	Agreement is reached between the Government and lawyers for the survivors on how the Compensation Program should be conducted. Details are set out in a Memorandum of Understanding ("MOU").
May 3	The Minister of Justice announces in the House the establishment of the Compensation Program. He also formally apologizes to the victims.

June 17	The Compensation Program office begins processing claims.
June 18	The Regulations under the *Family Benefits Act* and the *Social Assistance Act* are amended so that compensation received by survivors will not be considered in the determination of benefits.
Oct. 10	The Director of Finance for the Department of Justice is advised that the projected number of claims is 1,300. So far, $10 million has been paid out in 214 cases. The Minister of Justice advises the Minister of Finance that the projected budget is insufficient and that the costs of the Program may be as high as $86 million.
Oct. 31	Paula Simon, the head of the Program office, resigns.
Nov. 1	The Province puts the Compensation Program on hold. The Minister of Justice informs the claimants' lawyers of the suspension, but stresses that the Government is still committed to an ADR process.
Nov. 15	Alex Shaw, Q.C., a lawyer in the Department of Community Services, advises that there is a statutory duty to report child abuse that cannot be overridden by promises of confidentiality made to victims.
Dec. 6	The Minister of Justice announces the resumption of the ADR program with some modifications. Claims are to be investigated by the IIU. Awards exceeding $10,000 will are to be paid over a four-year period.

1997

Jan. 10	The Minister of Justice informs claimants' counsel that, henceforth, the RCMP and the IIU will be the only statement-taking bodies. However, statements made previously to Facts-Probe Inc. (the Murphys) will still be accepted.
Jan. 22	The Deputy Minister of Justice announces the appointment of Michael Dempster as Program Director of the Compensation Program.
March 25	NSGEU files a grievance relating to employees in three residential facilities, alleging unfair treatment and denial of natural justice.
Aug. 20	The Minister of Justice updates the Premier on the Compensation Program. He notes concerns about the time needed to properly investigate claims and fraud. He recommends changes to the Program, rather than holding a public inquiry.
Oct. 24	Cabinet approves the proposal by the Minister of Justice that the existing Compensation Program be modified.
Nov. 6	The Minister of Justice announces further adjustments to the Compensation Program. The changes are outlined in Guidelines.

Nov. 7	The Leader of the Opposition calls on the Premier to appoint an independent arbitration commission or arbitrator to provide a fresh and workable approach. NSGEU writes to the Minister of Justice expressing concern that, despite the changes to the program, current and former employees still do not get a fair and timely processing of allegations against them.
1998	
June 25	The Province and the NSGEU sign a final Memorandum of Agreement ("MOA") to define the options available to employees against whom allegations of abuse were made, but who were not discharged as a result of the investigation by the IIU.
June 30	By Order-in-Council a group of employees is designated a special class of persons for purposes of eligibility for early retirement.
1999	
March 1	The NSGEU writes to Minister of Justice Harrison and calls for an independent review of the Program.
Nov. 30	The Minister of Justice appoints the Honourable Fred Kaufman, C.M, Q.C., to conduct a review of the Government's response to allegations of institutional abuse.
December	The IIU submits a Report to the Minister of Justice regarding the allegations of abuse by former residents of Provincial institutions.
2000	
March 31	The Compensation Program office closes. Remaining files are to be handled by the Legal Services Division of the Department of Justice.
2001	
Oct. 31	The IIU concludes its mandate by completing reports on the allegations against all current employees.

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I

Scope and Nature of the Review

Abuse is a terrible thing. It forever alters its victims, particularly when they are children. And even more so where the victims are in the care of their abusers.

It follows that those who abuse children while in their care should be rooted out.

But not at the expense of basic fairness to all concerned.

Reports of abuse at Nova Scotia's youth facilities caused the Government to adopt a response. Central to the response was a Compensation Program for those said to have been abused.

The program was seriously flawed. So flawed that it has left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, innocent employees who have been branded as abusers, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia.

This Report cannot begin to separate out the true and false claims of abuse. One of the byproducts of a flawed Government response has been to now make that determination (in the vast majority of cases) impossible. But this Report can document how the Government's response, however well-intentioned, failed to meet the needs of its citizens, was fundamentally unfair to some of the Province's current and past employees, and did a disservice to true victims of abuse. As one former employee put it to me, "The road to hell is paved with good intentions."

1. THE MANDATE

On November 26, 1999, I was appointed by the Government of Nova Scotia ("the Government") to conduct an independent review of the Government response to reports of institutional abuse in Nova Scotia. In the public release announcing my appointment, my mandate was defined as follows:

> In October 1994 Government responded to reports of physical and sexual abuse by provincial employees against former residents of provincially operated institutions with a three-pronged strategy: an investigation of the alleged abuse; an assessment of the safety of youth currently in custody; and a Compensation Program.
>
> Subsequent to his review of the nature and extent of institutional abuse, former New Brunswick Chief Justice Stuart Stratton recommended the establishment of an alternative dispute resolution process for responding to alleged victims of institutional abuse.[1] The Compensation Program came into effect June 17, 1996.
>
> The Program has been adjusted twice since its inception.
>
> The Department of Justice established an Internal Investigation Unit to investigate the allegations of abuse against current employees for disciplinary purposes. The RCMP established Operation Hope to handle the criminal investigation of alleged perpetrators.
>
> The Program has been criticized by current and former employees who feel that their reputations have been tarnished; by claimants who believe changes made to the Program are too restrictive; and by citizens concerned about the cost and other aspects of the Program.
>
> In response to these criticisms, Government committed to review the Compensation Program for Victims of Institutional Abuse "to ensure the process is fair and upholds the rights of both the victims and the accused".
>
> *Terms of Reference:*
>
> The independent review will determine if the Government response to institutional abuse has been appropriate, fair and reasonable. The review will:
>
> - document and describe the Governmental response to the allegations of institutional abuse;

---

[1] To be technically correct, Mr. Stratton actually stated that he believed he had gathered "sufficient information for the Minister of Justice to be able to proceed with the next and final step in the process" (which the Minister had previously indicated would be an alternative dispute resolution mechanism – if Mr. Stratton found that abuse had occurred for which the Province was liable).

- assess the appropriateness of the Government response in light of:

    the contemporary context and the public interest;
    the interests of claimants, staff and former staff of the institutions;
    other available response options; and

- assess the implementation of each element of the Government response.

A report of the review findings will be made to the Minister of Justice and subsequently released to the public.

Activities undertaken during the review must not compromise any police investigation being conducted in relation to the alleged institutional abuse.

Some elaboration of my mandate is necessary.

The preamble to the Terms of Reference first describes the Government's *three-pronged response* to reports of abuse by provincial employees against former residents of provincially operated institutions: 1. an investigation of the alleged abuse (a reference to the Stratton investigation and Report); 2. an assessment of the safety of youth currently in custody (a reference to the review conducted by Viki Samuels-Stewart); and 3. a Compensation Program for Victims of Institutional Abuse.[2] However, the preamble then focuses on the Compensation Program, noting the criticisms levelled against it by various parties and the Government commitment, in response to these criticisms, to *a review of the Compensation Program*. Accordingly, a reading of the preamble alone might lead one to conclude that it is only the third prong of the Government response to reports of abuse, namely the Compensation Program, that is the subject of my review.

But the Terms of Reference direct me to determine "if the Government response to institutional abuse has been appropriate, fair and reasonable." I am further directed to assess the appropriateness of that response in light of other available response options and to assess the implementation of *each element* of the Government response. It follows that the Terms of Reference, crafted in the broadest terms, contemplate an evaluation of the entire Government response to institutional abuse and not only the Compensation Program.

I have endeavoured to interpret the preamble and Terms of Reference in a purposive way. In my view, the prime focus of my review must be directed to the Compensation Program itself. It represents that aspect of the Government response that has been most closely questioned and which, no doubt, now represents the most substantial component of the response. However, its appropriateness cannot be evaluated in a vacuum, but must be seen in the context of the complete Government response. To state the obvious, the appropriateness of the Compensation Program must be assessed, in part, by considering what information, including the Stratton and Samuels-Stewart Reports, was available to the Government when the Program was designed and approved. Its continued appropriateness, including revisions made to the Program midstream, can only be evaluated in the context of other ongoing activities, such as the police investigation and the establishment of an Internal Investigation Unit ("IIU") to investigate the allegations of abuse against current employees for disciplinary purposes. Simply put, other components of the Government response affected the design and subsequent revision of the Compensation Program.

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[2] For convenience, referred to as "the Compensation Program" or "the Program" in this Report.

Equally important, it is well recognized that an appropriate Government response to reports of institutional abuse needs to be multi-faceted and contain complementary components. If one component of the response is flawed or inadequate, it will likely affect the overall Government strategy. For example, features of the Compensation Program were based, in part, on the conclusions contained in the Stratton Report. Accordingly, an examination of the mandate conferred upon the Stratton investigation and its conclusions has been necessary. Similarly, if different components of the Government response operated at cross-purposes, or sometimes even duplicated each other, the overall effectiveness of the Government response would have been affected.

In summary, I interpret my mandate to be the documentation and assessment of the full Government response, with particular emphasis on the Compensation Program, and that is what I have done.

2. "APPROPRIATE, FAIR AND REASONABLE"

As mentioned above, the Terms of Reference require me "to determine if the Government response to institutional abuse has been appropriate, fair and reasonable." I am also directed to assess the "appropriateness" of the response in light of "the contemporary context and the public interest; the interest of claimants, staff and former staff of the institutions; [and] other available response options."

While Terms of Reference in general are not akin to a statute, and need not, therefore, be analysed by application of the strict rules pertaining to statutory interpretation, it may nevertheless be useful to look at three key words – appropriate, fair and reasonable – and determine what they mean in the context of this review.

F2

The Shorter Oxford English Dictionary (3rd edition) defines the terms as follows:

Appropriate...	4.	Specially suitable, proper.
Fair...	3.	Free from bias, fraud or injustice; equitable, legitimate.
Reasonable...	3.	Agreeable to reason; not irrational, absurd or ridiculous;
	4.	Not going beyond the limit assigned by reason; not extravagant or excessive; moderate.

Black's Law Dictionary (5th edition) gives these definitions:

Fair	Having the qualities of impartiality and honesty; free from prejudice, favouritism, and self-interest; just; equitable; even-handed; equal, as between conflicting interests.
Reasonable	Fair, proper, just, moderate, suitable under circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rationale; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

Clearly, there is a common theme to these terms, and I suggest it is fairness, for if a response is unfair, it is hard to imagine how it would be either appropriate or reasonable. I do not, therefore, intend to embark on a detailed analysis of each of these terms: they have, as I said, a common thread. Giving words their ordinary meaning, both I and the reader will have no difficulty interpreting the phrase, and thus my mandate.

3. LIMITATIONS OF MANDATE

Some important limitations on this review must be articulated at this point.

I was to conduct a *review*, not a *public inquiry*. The distinction is an important one. During a review, witnesses cannot be compelled to testify under oath or, indeed, to assist the review at all. The production of documents may be requested but cannot be compelled. Persons providing relevant information or documents may be consulted in private. This is often preferable, particularly where the legitimate privacy interests and personal dignity of those persons may otherwise be compromised. There is no opportunity for interested parties to test, through cross-examination, the accuracy or veracity of statements made by other parties. Given these limitations, it is obvious that neither findings of credibility nor disputed findings of misconduct can fairly be made against anyone.

The law is also clear that, whether I am conducting a review or a public inquiry, I am precluded from expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization. This means, for example, that I am precluded from determining whether any specific allegation of abuse is well-founded or not. Similarly, I am precluded from determining whether any specific allegation of public mischief or fraud made against a claimant seeking or obtaining compensation is well-founded or not. Indeed, I am not only precluded from doing so, but it would represent the ultimate unfairness for me to do so, given the limitations upon my powers.

As well, I am specifically directed not to compromise any police investigation in relation to the alleged institutional abuse. I am aware that the RCMP has been conducting a lengthy investigation into the allegations of institutional abuse which directly relate to my mandate. I am also aware that certain allegations of public mischief or fraud against claimants for compensation have been referred to the authorities for investigation. My staff and I have met with the RCMP on several occasions to ensure that our activities do not compromise in any way the ongoing police investigation. This approach is intended to ensure fairness to *all* parties potentially affected by that or any other investigation.

Not only do fairness and legal constraints prevent me from evaluating the merits of each allegation of abuse that has been made, it is quite unnecessary to do so in order to accomplish the objectives of this review. As I said when my appointment was announced, "the challenge of this assignment will be to learn lessons from the past ... and hopefully bring forward a blueprint for the future." I have identified failings associated with the Government response to institutional abuse and made recommendations for the future, should similar situations develop. These recommendations are not dependent in any way upon the merits of individual allegations of abuse, but reveal systemic problems with the way in which reports of abuse were investigated and addressed. For example, a Government response which failed to adequately accommodate fairness concerns of suspected employees is flawed, regardless of whether those employees, or any one of them, did or did not abuse children. *A Government response that fails to appropriately balance the interests of complainants and suspects is flawed, regardless of whether individual complainants or suspects are in the right or in the wrong.*

A related limitation upon my mandate also requires elaboration here. Certain current employees have received letters of exoneration from the Government, following internal disciplinary investigations conducted into allegations made against them. Further letters of exoneration are likely to follow.[3] Employees, and counsel on their behalf, have submitted that the Government response to reports of institutional abuse was seriously flawed and has resulted in irreparable damage to innocent employees and their families. They have asked that I recommend how, and to what extent, exonerated employees should be compensated by the Government.

My Terms of Reference, even giving them the broadest possible interpretation, do not permit me to make such recommendations. However, I do expect that the conclusions that I am permitted, indeed required, to arrive at, may have implications for some of the broader issues that are beyond the scope of my mandate and that arise in the aftermath of the Government's response to reports of abuse.

4. USE OF TERMINOLOGY

A word must be said at the outset as to how interested parties are "labelled." Former and present employees of institutions where abuse has been alleged have been described in various documents and media accounts as "the accused" or as "the abusers." Apart from references to employees who were formally charged or convicted in criminal proceedings, I have avoided describing any employees in this way. For convenience, former and present employees are generally described as "employees," unless the context otherwise requires.

Former residents of institutions where abuse has been reported have been described in various documents and media accounts as "victims," "claimants," "complainants" or "survivors." Individuals who have been physically or sexually abused are entitled to be described in a way that shows sensitivity to their ordeal and does not perpetuate their victimization. Indeed, the literature reflects that the use of the term "victim" to describe these individuals creates the danger that they will be defined by their victimization, rather than by their affirmative steps to overcome their ordeals. Accordingly, the term "survivor" has been utilized in the literature to sensitively describe them. As the Honourable Sydney L. Robins said in his recent Report, "those who have truly been subjected to physical and sexual abuse and who have strived to overcome their ordeal are 'survivors' in the fullest and most positive sense of that word."[4] However, where, as is the case here, issues remain as to who was truly subjected to abuse and by whom, and where allegations of abuse and of public mischief are the subject of current investigations, the most sensitive and least presumptuous way to describe these individuals is as "claimants," unless the context otherwise requires.

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[3] Issues pertaining to when and how employees are exonerated, as well as the interplay between disciplinary exoneration, the outstanding criminal investigation, and compensation being awarded respecting claims involving the same employees, are dealt with later.

[4] The Honourable Sydney L. Robins, *Protecting Our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools* (Toronto: Ontario Ministry of the Attorney General, 2000) at p.13.

5. PRIVACY ISSUES

Although, as I have said, this review was not designed to evaluate which claims of abuse do or do not have merit, an assessment of the Government response to reports of institutional abuse required that I hear both from individuals who claimed to have been abused and from institutional employees who have been accused of, and deny, abuse. Their perspectives enabled me to put a 'human face' to the conflicting positions advanced by interested parties and better appreciate the systemic concerns being expressed about the way in which both claimants and employees were treated. I have no doubt that many more individuals than I heard from would have liked to meet with me or my staff. Sheer logistics dictated an approach that enabled me to hear from representative individuals, selected in consultation with interested parties and their counsel.

Those individual claimants and employees with whom I met were encouraged to focus on the process and the effect of the Government response upon their lives and the lives of their families, rather than discussing in detail any specific allegations of abuse or their responses to such allegations. This approach was also consistent with the desire not to gratuitously re-victimize anyone who might be psychologically or emotionally affected by a recital of either allegations of abuse or their responses to such allegations.

Though the specific allegations of abuse and responses to such allegations were generally not discussed, individuals described for me matters sometimes involving intimate, personal and painful experiences. These matters are summarized in my Report and are of importance to the systemic issues addressed here. However, I have respected the dignity and legitimate privacy interests of those individuals with whom I met, as well as others whose names were raised during the review. Accordingly, this Report generally does not contain the names of either claimants or employees against whom allegations of abuse have been made. However, names have been used where they are now in the public domain, it is essential to the unfolding of the narrative, and it could be done without causing the persons unnecessary embarrassment or prejudice. Persons convicted of offences are named, since their identification does not generally raise the same privacy concerns and is frequently essential to the unfolding of the narrative.

6. LEGAL PRIVILEGE

I earlier noted that a review of this nature cannot compel the production of documents. That being said, interested parties cooperated fully in permitting me and my staff to access relevant documents. In particular, Government officials were instructed to cooperate fully with the review, which they invariably did. Some of the documentation which we examined within Government files may well be subject to privilege. Memoranda presenting recommendations to Cabinet, records of Cabinet deliberations or of discussions between Ministers relating to the formulation of Government policy are examples of documents that are commonly immune from public disclosure. Similarly, communications involving Government counsel may involve solicitor-client or litigation privilege. The Chambers-Baker (IIU) Report is another example of a document which has been released to the public in edited form, but which I have reviewed in its entirety. Since I was conducting a review on behalf of the Minister of Justice, I stood in the shoes of the Minister and accordingly was given full access to documents, whether or not these documents could be obtained by members of the public.

7. EFFECTS OF ABUSE

In order to evaluate the Government response and make recommendations for the future, it was important that I understand and appreciate the impact that this response (and, in particular, the Compensation Program) had upon those most directly affected by it – claimants, past and present employees, and their families.

The design and implementation of a Government program intended to benefit those who have truly been abused must recognize and consider the effects, both short- and long-term, of sexual and physical abuse on their victims.

The impact of sexual victimization on young people was well-documented in the Honourable Sydney L. Robins' recent Report *Protecting our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools*.[5] Drawing upon an extensive body of mental health research and literature, Mr. Robins noted that, while the impact of sexual abuse will vary considerably from person to person, the abuse of young people during the critical period of their development can lead to psychological and social dysfunction, as well as compromised physical health. Negative consequences may be greater where offenders target, as they often do, vulnerable children. Of course, that observation may have particular relevance to young offenders, many already with dysfunctional, if not abusive, histories, who are abused within a custodial setting.

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[5] *Ibid.* at p.13. All quotations which follow are taken from this Report.

Contrary to some conventional beliefs, the impact is often less correlated with the severity or intrusiveness of the abuse than with the pre-existing relationship with the abuser and the vulnerability of the victim. As Mr. Robins observed, "a seemingly minor incident of sexual touching by a close and trusted adult can have a profound and lasting impact." Children who delayed disclosure, who were exposed to prolonged abuse, or whose disclosures were followed by punishment, disbelief, anger, or rejection by family and friends, were shown in one study to have the most troubling outcomes several years after the abuse. The fact that an unsupportive response to a young person's disclosure of abuse (such as others failing to believe the child, blaming the child or supporting the abuser) may increase the effects of abuse, represents a strong argument advanced in favour of a compensation program as an alternative to conventional litigation.

Sexually abused children can re-experience symptoms at various stages in life: when the person first attempts to become sexually active; when entering marriage; when he or she has a child, or when that child reaches the age at which the person was abused. Young people may not manifest contemporaneous ill effects, but may show increased symptoms over time.

The victims who spoke to Mr. Robins reported a "range of effects including low self-esteem, depression, emotional and mental distress, nightmares, difficulty in developing meaningful and healthy relationships, inability to trust other individuals, flashbacks, alienation from parents and other family members and an inability to concentrate."

The claimants who spoke with me reported similar effects.

Mr. Robins elaborated on the general symptoms of trauma experienced by sexual abuse victims as their lives progressed. The stigma of sexual victimization explains why victims may be reluctant to disclose their abuse and why they sometimes carry feelings of shame and embarrassment for years. Abuse by persons in positions of trust may induce distrust of authority figures generally. Some individuals continue to feel vulnerable to further abuse, particularly where the adults upon whom they relied for protection from harm failed to protect them. Many acute symptoms of sexual abuse are similar to children's reactions to stress: "fear, increased anger, anxiety, fatigue, depression, passivity, difficulties focussing and sustaining attention and withdrawal from participation and interest in usual activities." In later childhood and early adolescence, these reactions may be manifested by "delinquency, drug use, promiscuity, or self-destructive behaviour." Sexual abuse may adversely affect a victim's ability to enjoy sexual intimacy in later relationships.

Of particular relevance here, Mr. Robins documented the trauma associated with testifying about abuse. He described not only the ordeal for young children and adolescents, but also for adults asked to relive their experiences as children. This can bring back active memories of the abuse and trigger feelings of outrage, powerlessness, depression and anxiety. Testimony may be preceded by extended anxiety, increasing as the date for testifying draws nearer. During this time frame, individuals may be subject to angry outbursts, have disturbed sleep patterns, may isolate themselves or find themselves easily distracted. In high profile cases, the abused individual's identity may become known to the entire community. Further, that individual may be deeply disheartened by the case mounted by his or her abuser. For example, a victim of abuse would find it demoralizing not only to be doubted, but to hear the abuser's reputation and good character cited in the latter's defence, and contrasted with the victim's possibly unsavoury history.

Mr. Robins also noted that, in the context of sexual abuse by teachers upon students, students might be called upon to describe their abuse at a preliminary inquiry, at a criminal trial and at disciplinary proceedings: "the multiplicity of proceedings (and the delays associated with these proceedings) contributes to their emotional distress, interferes with counselling, diminishes any sense of well-being, and prevents closure." Of course, these comments can be applied with equal force to institutional residents who might be required to testify at such proceedings, as well as at a civil trial, should compensation be sought in the conventional way.

Mr. Robins concluded that "[t]he nature and extent of emotional impact or trauma suffered by witnesses, whether children or adults, varies in each case. There are witnesses who may regard the testimonial experience as cathartic. However, the potential for significant emotional distress or trauma in cases involving sexual misconduct is clear and incontrovertible."

As I have earlier noted, Mr. Robins' findings mirror the feelings described by a number of claimants with whom I spoke, in relation to both sexual and physical abuse.

What all of this means is that governments may legitimately consider the impact that abuse has upon true victims in designing responses to reports of abuse. Similarly, governments may legitimately seek to avoid the emotional distress to those individuals sometimes associated with formal testimony: hence, one of the rationales for a compensation program. However, this recognition does not mean that any verification of complaints should be dispensed with in the interests of abuse victims, no matter the costs to the administration of justice and the rights of the accused. Witnesses can be accommodated, even in testimonial settings, in ways that avoid or reduce distress or trauma and which remain consistent with the interests of the public and the accused.

Elsewhere, I address how this can be done within a model that provides scope for an appropriate verification process.

8. THE PROCESS

The process that I followed in conducting this review was developed in consultation with interested parties and my staff. (A memorandum from my staff to all interested parties respecting this process is reproduced in Appendix "A".)

This review has both factual and analytical components. A description of the Government response to reports of institutional abuse may be regarded as the factual component of the review. This required me and my staff to accumulate documentation from a variety of sources, to organize and assimilate these materials and question many individuals who had knowledge of various elements of the Government response or who were affected by it.

The breadth of the Terms of Reference, as well as fairness to affected parties, required that I or my staff interview over 100 individuals. These interviews included persons involved in the design or implementation of the Government's response, Ministers and Deputy Ministers, internal investigators, police officers, claimants, current and past employees, therapists, Dr. Elsie Blake of the Family Services Association, file assessors, counsel involved in the process, administrators, former Chief Justice Stratton and his investigators, and Ms. Viki Samuels-Stewart. Written feedback was also received from a number of file reviewers.

My mandate also compelled an exhaustive review of available documentation, much of which remains with the Government. To this end, my staff first determined, through the central registry and other sources, what materials were available. Much of this material was then examined, including files at the Department of Justice relating to the design and creation of the Government response to reports of institutional abuse, the Compensation Program, the Samuels-Stewart audit and the investigation of current employees. We also examined the files at the Compensation Program's offices pertaining to the negotiations that led to the finalization of the program and the administrative files regarding how the program was run.

There were 1,235 files processed in the Compensation Program. My staff has reviewed 90, or roughly 7.5%. The 90 files were selected randomly from an alphabetical listing. All available material with respect to each file was reviewed to ascertain the following types of information:

- Claim start date and settlement date (i.e., the time frame of the claim);
- The amount claimed and the basis for the claim;
- The amount offered and reasons for the response;
- The settlement amount (if a settlement was reached);
- The amount of the counselling award;
- The existence of interim counselling;
- Whether the claimant was a Stratton interviewee or a victim in a completed criminal case;
- The content of a report (if any) from the IIU, and the name of the IIU investigator;
- The identities of all employees that were named in the allegation, the type of allegation made, and the response from the employees, if any;
- If the matter went to file review, the amount awarded and the reasons given, the name of the file reviewer and the method of his or her selection;
- Whether the claim was withdrawn and, if so, whether litigation ensued;
- Whether or not the file was the subject of a fraud investigation; and
- Any letter in the file expressing concern over the process.

The file review was done to ensure that I obtained an accurate picture of the day-to-day workings of the Compensation Program. An examination was done of the way in which claims were processed, the difficulties encountered, and the reasons for the difficulties. As well, although efforts were made to ensure that the claimants and employees whom I interviewed were representative of the process, the review of the files was intended to complement that interview process and ensure representativeness. Additional claimant files were examined as issues arose during the interview process.

In reviewing these and other files, steps were taken to maintain the confidentiality of both claimants and employees mentioned in those files. Indeed, information that could lead to their identification is omitted from my Report, unless consent has been obtained or, as earlier noted, the information is already in the public domain and necessary for a better understanding of the narrative. Throughout, my staff remained mindful of issues of privacy raised by Government and other interested parties.

Other files examined were these:

- Claims submitted to the Compensation Program which were later withdrawn or deemed ineligible;
- Files pertaining to civil litigation commenced against the province both before and after the Government's response was implemented;
- Files at the Correctional Services Division pertaining to the Government's response, including the Memorandum of Agreement (see Chapter XIV);
- Administrative files at the Internal Investigations Unit;
- Materials collected or emanating from the work conducted by former Chief Justice Stratton and his staff;
- Materials collected from counsel for claimants and from counsel for current and former employees.

Much of the history (though not the appropriateness) of the Government response to reports of institutional abuse is uncontested. Some of it is less settled and admits of differing interpretations which could not always be reconciled. These differing interpretations are sometimes reflected in my Report. By and large, however, I was able to discern and describe what the Government response to institutional abuse was and the thought processes that caused the Government, rightly or wrongly, to act in the way that it did.

The factual component of the review included an examination of the impact that the Government response had upon those who were affected by it – particularly the claimants and the employees. As I earlier noted, to understand this impact, I personally met with a number of claimants and employees. Again, the objective here was not to probe their individual accounts or defences but, instead, to learn how the Government response, most particularly the Compensation Program, affected their lives and the lives of their families. These meetings were facilitated by counsel for interested parties, whose involvement was very much appreciated, and who also assisted the review in bringing forward individuals who could enlighten me as to a wide range of experiences. Put simply, the experiences of those individuals I heard from were both unique and, in some respects, likely representative of the experiences of others with whom I was unable to meet. I am grateful to them all for their important contribution to this Report.

Every effort was made to make the interviewing process as non-intrusive and non-traumatic for everyone as possible. As well, we endeavoured to accommodate individuals to the extent possible. To this end, some interviews were conducted privately, others in group sessions, some in Halifax and others in locations elsewhere in Nova Scotia. Some interviews with individuals incarcerated or located outside of Nova Scotia were conducted by telephone. Several individuals also wrote to me.

The second component of this review was to *evaluate* whether the Government response was fair, appropriate and reasonable and make recommendations for the future. This may be characterized as the analytical (and systemic) component of the review. It represents, I believe, its most important function.

To this end, my staff accumulated materials from various jurisdictions that address how reports of institutional abuse have been or should be addressed by governments. These include law commission reports, studies, discussion papers, alternative programs, models, articles, and internal evaluations of existing programs. Interviews of individuals involved in the design or implementation of alternative programs elsewhere in Canada were also conducted. They were able to provide the review with real insights into the lessons learned in other jurisdictions which have relevance to Nova Scotia. This Report contains extensive references to such programs developed or contemplated in other jurisdictions.

At the outset of the review, a detailed list of systemic issues to be potentially addressed in my Report was prepared. This list was finalized only after the input of interested parties, including the Department of Justice, and modified to reflect concerns or additional issues raised in the course of these consultations. Various parties have utilized this list of systemic issues to guide their submissions to the review. An examination of these questions reinforces the interplay between the factual and systemic issues to be addressed in this Report.[6]

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[6] The list of systemic issues is reproduced in its entirety as Appendix "B".

Once a number of interviews were conducted and voluminous documentation reviewed, interested parties were invited to make written and oral submissions to me. I received written and oral submissions on behalf of claimants, past and present employees, the Nova Scotia Government Employees' Union ("NSGEU") and the Department of Justice. The Department of Justice's submissions were intended only to clarify factual issues and invited me to consider certain contextual facts in making my findings and recommendations. The Department expressly refrained from urging specific recommendations upon me. The written submissions were exchanged before oral submissions were made, permitting the fullest discussion of the issues.

9. FUNDING

From the earliest stages of this review, it was clear to me that I needed to understand and consider the perspectives of various interested parties, most particularly those who reported institutional abuse, those who were employed at the various institutions and were sometimes suspected of perpetrating such abuse, and those within Government or retained by Government who were involved in either formulating or implementing the Government response. Some of those parties did not have easy access to funding to enable them to be assisted by legal counsel. It was obvious to me that these parties – particularly claimants and employees – could only fully assist the work of the review if represented by counsel. Some had suspicions or concerns about this review and its potential impact upon them, particularly given ongoing investigations taking place, which necessitated, in fairness, the intervention of counsel. The counsel who represented these parties also often had longstanding prior involvement in the issues addressed by me and, as such, were helpful resource persons in their own right. Each counsel was able to assist me in piecing together a chronology of relevant events, the impact of the Government response upon their clients and the lessons to be learned from any inadequacies in that Government response.

It would have been unreasonable to expect that those counsel could provide a meaningful contribution to the work of this review without any remuneration whatsoever. On the other hand, I was mindful of concerns that financial expenditures of this review not become another source of contention. I therefore recommended to the Government that a limited number of counsel be remunerated for their representation at a rate previously established by Government for such work and with a predetermined maximum amount that would be compensated. The maximum amounts were to be fixed to ensure that parties of similar interest would work together and not duplicate efforts and to ensure that all parties would be dealt with equitably. The Government accepted this recommendation. I am mindful that the time commitments of some counsel considerably exceeded their allowable maximum remuneration. Their contribution, and that of all counsel, was greatly appreciated and was of substantial assistance to me. The funding mechanisms in place have worked well, and have shown fiscal restraint consistent with the need for meaningful involvement of interested parties in the process.

10. STRUCTURE OF THE REPORT

Chapter I is designed to introduce the reader to the scope and nature of my mandate. Chapter II provides a historical overview of the institutions where abuse was alleged. Prior to the Government's response commencing in 1994, allegations of abuse at these institutions had already surfaced and, indeed, been the subject of police investigations and court proceedings. A brief history of these proceedings prior to 1994 is also contained in this chapter.

Chapters III to XII describe the Government response to reports of institutional abuse from its early formulation to the various modifications throughout.

The impact of the Government response on both claimants and employees and their families is discussed in Chapter XIII. Ultimately, negotiations between the Nova Scotia Government Employees Union and Government led to a Memorandum of Agreement defining options available to certain employees against whom abuse allegations had been made. This Memorandum of Agreement is addressed in Chapter XIV.

The Internal Investigations Unit was formed to investigate allegations made against current employees for disciplinary purposes. Its role was later expanded. A report was prepared by the IIU (the Chambers-Baker Report) which has acquired prominence in ongoing court proceedings and which contains an implicit evaluation of the Compensation Program. It is addressed in Chapter XV.

My evaluation of the Government response is contained in italicized sections entitled Analysis in Chapters III to XV.

Having described and evaluated the Nova Scotia Government's response, the Report then describes in Chapter XVI the responses in other jurisdictions to reports of institutional abuse. Chapter XVII discusses the recent study by the Law Commission of Canada entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. Drawing upon the lessons learned from the Nova Scotia experience and from the systemic materials from other jurisdictions, Chapter XVIII contains my recommendations – the 'Blueprint for the Future' – and the Conclusion.

II

Historical Overview

1. HISTORY OF RESIDENTIAL INSTITUTIONS IN NOVA SCOTIA

Residential institutions in Nova Scotia have been in existence since at least the mid-1700s. Early institutions were charitable in nature and housed young persons for a variety of reasons, including delinquency, neglect and poverty. Young persons were not always treated separately from adults; indeed, they were sometimes housed together. However, as social theories shifted, so did the purpose and nature of residential institutions. Starting with St. Mary's Convent in 1849, a number of institutions were opened specifically for children and youth.

Throughout the 20th century, different approaches were taken to the institutionalization of young offenders. At times, caretakers sought to discipline them, reform their social values, or rehabilitate them. Recently, greater emphasis has been placed on a restorative justice approach, which calls upon offenders to acknowledge their errors and demonstrate accountability to their victims. For children and youth placed in institutions as a result of a disability, there is currently a trend toward de-institutionalization through the use of in-home supports and community integration.

(a) Shelburne Youth Centre

In 1865, the distant precursor of the present-day Shelburne Youth Centre, the Halifax Industrial School for Boys, was opened in Halifax. The school was a charitable Protestant institution set up to meet the needs of delinquent, neglected and dependent boys. In 1885, the Catholic Church opened the St. Patrick's Boys Home to meet the similar needs of Catholic boys. Although at times government funding was provided, these were non-governmental institutions.

In 1947, school officials announced that the Halifax Industrial School for Boys would be closed due to lack of funds. The provincial Department of Public Welfare responded by taking over the facility on September 15, 1947. It was renamed the Nova Scotia School for Boys.[7] The enabling legislation permitted young men serving sentences of imprisonment in common jails, city prisons and the Nova Scotia Reformatory to be transferred to the school.

The Halifax facilities were quickly deemed inadequate, and in 1948 the school was relocated to the Town of Shelburne, over 220 kilometres from Halifax and 100 kilometres from Yarmouth. The move generated a good deal of controversy. People questioned the motivation for it, and whether it was a good idea to locate the school so far away from services provided in urban centres like Halifax and Yarmouth. The move to Shelburne also made it more difficult for most families to visit their children.

In 1955, the St. Patrick's Boys Home was no longer able to operate. Residents of that facility were consequently moved into the Nova Scotia School for Boys. The school's average population increased from about 40 to around 70 residents.

In the mid to late 1980s the institution underwent more fundamental changes. The school had traditionally housed only boys. In 1985, however, girls who had resided in the Nova Scotia School for Girls were moved to the facility, which was renamed the Shelburne Youth Centre ("SYC"). Later, all male residents aged 16-17 were moved to the Nova Scotia Youth Centre, which was opened in Waterville in 1988.

The physical layout of the school changed over the years. Two abandoned World War II Navy barracks were initially used to house the residents. By the early 1960s, the facility contained seven dormitories, five dining rooms, four TV rooms, two libraries, games-rooms, storerooms, laundry rooms, clothing stores, a kitchen, an assembly hall, and a canteen. A separate administration building contained classrooms, an industrial arts shop, hobby facilities and a staff conference room. A chapel and gymnasium were also available to the residents. By 1978, all the old buildings had been replaced with new facilities, including 'H' shaped cottages. The grounds were also built up over the years to provide lawns and gardens, a skating rink, a playing field and a swimming jetty. A school campsite was set up at Alvin Lake. Currently, accommodation is provided in ten 12-bed living units that are interconnected and form a circle around a recreational area.

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[7] Fitzner, Stan, *The Development of Social Welfare in Nova Scotia* (unpublished paper prepared for the Department of Public Welfare, December 1, 1967). Much of the information contained in this section came from this study.

The school historically operated under the auspices of the Department of Community Services. On August 1, 1994, however, responsibility for the centre shifted to the Department of Justice.

Youth workers currently perform a wide range of duties, including those of counsellor, teacher, security officer and recreation officer. The facility holds about 45 male and 15 female residents.

(b) Nova Scotia School for Girls

The Nova Scotia School for Girls in Truro was first called the Maritime Home for Girls. It was established by the Protestant Churches of the Maritime Provinces on September 1, 1914. Its purpose was to provide a home and training school for girls from Nova Scotia, New Brunswick and Prince Edward Island who were homeless or who were being reared in "vicious and degrading" surroundings. The emphasis was on teaching the girls to cook, sew and keep house, in addition to providing a curriculum that parallelled the public school system.

When it opened, the home consisted of only one large building. However, by 1920, there were three large buildings which contained bedrooms, dining rooms, living rooms and kitchen facilities. By the early 1960s, the facility had single rooms for most girls, with a few five-and eight-bed dormitories for use when the single rooms were full. The facility also operated a farm which helped to finance its operation. It provided farm training opportunities for residents during the summer months.

In the mid-1960s, the Board of Governors encountered difficulties in financing the institution. As a result, the Department of Public Welfare took over responsibility for it on April 1, 1967.[8] It then became known as the Nova Scotia School for Girls.

The Government determined that the facilities required upgrading. One building was demolished and another was renovated. New residences, which included dining facilities, administrative offices and a pre-release unit, were completed by 1972. A new education centre was opened in 1980.

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[8] The Department of Public Welfare was later renamed the Department of Community Services ("DCS").

The enactment of the *Young Offenders Act*[9] in 1984 caused the Government of New Brunswick to develop its own facilities, with the result that the population of the school decreased. In February 1985, a decision was made to convert the school into a provincially funded co-educational facility for emotionally disturbed children, called the Nova Scotia Residential Centre. Residents from the former Nova Scotia School for Girls were transferred to the Shelburne Youth Centre.

The Nova Scotia Residential Centre closed in June 1997. A new secure treatment facility, the Wood Street Centre for emotionally and behaviourally challenged children, is currently under construction in Truro.

(c) Nova Scotia Youth Training Centre

In 1927, an *Act to Establish a Nova Scotia Training School for the Treatment, Care and Education of Mentally Defective Children* was passed.[10] A Board of Management was appointed on April 15, 1929, and a school, the Nova Scotia Training School, was opened. It later became known as the Nova Scotia Youth Training Centre.

The centre was operated by the Department of Community Services. By the late 1980s, it served on average 36 to 38 mild to moderately challenged children between the ages of 10 and 19. Other centres in Digby, Dartmouth, Pictou and Sydney provided services to 160 severely challenged children from infancy to 18 years of age.

All of the centres closed by September 1997. The residents had been reintegrated into their communities.

2. REPORTED ABUSE PRIOR TO 1994

In order to better understand the Government's response, it is useful to set out some of the background events, as well as some of the information that the Government knew or ought to have known when it determined how it was going to address the claims of institutional abuse.

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[9] S.C. 1980-81-82-83, c.110.

[10] S.N.S. 1927, c. 5.

(a) Policies

Early in the operation of the Nova Scotia School for Boys, officials developed policies concerning the use of force by provincial employees upon their wards. In September 1948, soon after the School moved to Shelburne, institutional policy dictated the following:

> Supervisors are not to strike boys with anything except the regularly prescribed strap and this should be rigidly enforced. ... Corporal punishment is administered by the supervisors who have trouble with the boy. He must do it after consulting with the Principal. ... It must be done in the presence of at least two supervisors and must be done with only the prescribed strap. A written report must be submitted by the supervisor who had the difficulty with the boy. ... A boy is not to be struck with the hand or other instrument unless in self-defence. Corporal punishment should come within a reasonable time after misconduct and should not be administered when a supervisor is mad or annoyed.

By today's standards, the use of the strap, "regularly prescribed" or otherwise, is unacceptable. Nonetheless, it is clear that by 1948 officials had turned their minds to defining the 'appropriate' use of disciplinary force.

In the years that followed, managerial direction on the use of force became more detailed. From various documents outlining the policies and procedures to be followed by staff, it is clear that school officials were actively involved in providing guidance on the day-to-day supervision and control of the boys, and on the operations of the school. It is also clear that there was ongoing dialogue among staff and management with respect to appropriate methods for supervising the boys. Many of these discussions arose from specific encounters with residents or differences in opinion over the best way to deal with difficult situations.

In 1959, Dr. Fred MacKinnon, the Deputy Minister of Public Welfare, provided a report to the Minister concerning the morale, discipline and general situation of the Nova Scotia School for Boys. In his report, he stated that although corporal punishment has been used in the past, "we have not used it for some time and I am quite certain the present administration will not resort to corporal punishment and beating boys unless as a last resort for a situation." He also stated that, though the public may demand corporal punishment for the residents of the school, beating and punishment are not as effective as understanding and firm discipline.

In 1978, a Review Committee was established at the Nova Scotia School for Boys to develop a protocol to investigate use of force situations. This appears to be the first attempt by school officials to develop a consistent institutional response to claims of excessive use of force. The purpose of the committee was as follows:

1. To investigate the circumstances in a situation where force was used, or allegedly used, by a staff member in dealing with a boy;
2. To determine whether a staff member using force with a boy acted outside the philosophy and policy of the Institution;
3. To submit a written report to the Superintendent or, in his absence the Assist. Superintendent.

Throughout the following year, the Review Committee developed a written policy on the use of force, and by January 1980, the Policy Statement on the Use of Force in a Training School was completed. It provided that physical force should be used only in exceptional circumstances: to protect oneself, to prevent the resident from harming himself, and to separate residents before they do harm to each other. The policy also outlined the procedure to be followed if force was used by a staff person. In the ensuing years, the wording of the policy changed, but its essence remained the same. In 1987, a procedure for referring matters to the police was added as a result of residents and staff inquiring as to their ability to initiate investigation and prosecution for incidents of assault.

The existence of a policy does not necessarily mean that all incidents were reported as they happened, nor does it say anything about the frequency of incidents. It does establish, however, that on the issue of physical abuse there was an ongoing and serious concern on the part of at least some management and staff about the appropriate use of force in the institution. I did not see any similar documents on issues surrounding sexual behaviour or abuse in the institution, either between residents or between residents and staff, until the 1990s.[11]

(b) Police Investigations

(i) *Shelburne School for Boys*

In the 1980s and early 1990s some incidents of alleged physical abuse were referred to the RCMP for investigation. However, there is no record of a staff member ever being charged with assaulting a resident. The situation with respect to allegations of sexual abuse was slightly different.

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[11] The institution did develop a Code of Conduct for residents that made reference to "sexual misconduct." The term was defined simply as "an unlawful sexual act." The exact date of the original Code is unknown, but is not likely to be before 1980.

While some allegations were dealt with internally,[12] others were reported to the police and charges were sometimes laid.

In February 1986, three female residents at Shelburne complained that a counsellor had made sexual advances towards them. The management at Shelburne immediately investigated the allegations. Within two days, all individuals concerned were interviewed and the matter was reported to the RCMP. The RCMP conducted their own investigation and laid charges against the employee, but the charges were later dismissed when the three complainants failed to appear in court.

By far the most notorious case of reported abuse in a government-run institution in Nova Scotia is that of Patrick MacDougall. It was a complaint against MacDougall in 1991 that sparked an RCMP investigation which took approximately 18 months and which led to the first (and only) successful prosecution of any counsellor or former counsellor from Shelburne. The complainants in the case subsequently initiated civil proceedings against the Province – proceedings which spurred the Government to consider and ultimately implement the response which is the subject of my review.

The police investigation into MacDougall's conduct began in January 1991, when Peter Felix Gormley contacted the RCMP in Charlottetown to file a complaint of sexual assault. He alleged that while he was at Shelburne from 1963 to 1968, a counsellor by the name of 'Jim' MacDougall had fondled him and performed oral sex on him. He also stated that he saw the counsellor assault other residents, some of whom he could name, some of whom he could not. The RCMP determined that 'Jim' MacDougall was actually one Patrick MacDougall, who had been transferred out of Shelburne in the mid-1970s due to an allegation of having fondled a resident. The RCMP believed that given MacDougall's 17 years at Shelburne, there may have been other boys with similar experiences, and efforts were made to identify at least one other resident who could corroborate Gormley's complaint.

Police reports indicate that current and former employees at Shelburne cooperated fully with the investigators. For instance, Lee Keating, a former employee, spoke frequently with the RCMP.

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[12] For example, in 1961 a resident at the Nova Scotia Training School accused a maintenance man of having unbuttoned her blouse and touched her breast. The girl was interviewed and found to be truthful, but the police were not contacted. The employee was retiring soon and had what was called an "ungovernable temper," and it was considered better to simply wait for him to retire. The Superintendent expressed concern that the employee might harm the girl and her family if he was told of the complaint.

There were also internal reports of improper behaviour by counselors at Shelburne. For example, it was reported to management that in January 1984 a male employee had, in the presence of other staff, crawled into bed with some boys, thereby alarming them. When asked to account for his conduct, the employee explained that he had done it as a joke. He was advised not to repeat the behaviour in the future.

He provided information about rumours concerning MacDougall's close relationship with young boys, and he told of having overheard residents refer to his colleague as "the old fruit." But Keating had never been able to get any of the residents to elaborate on why they referred to MacDougall in that manner. Further, the persons named by Gormley as having been additional victims of MacDougall's behaviour denied any impropriety. Officials from the Department of Community Services also advised the RCMP that most of the records from Shelburne were destroyed when the *Young Offenders Act* was implemented.

The RCMP was able to locate boxes of index cards at Shelburne which gave basic information on former residents. A list of all former residents was prepared from the index cards. Keating then reviewed the list and identified residents who had been under MacDougall's care. By September 1991, a number of these individuals were contacted and interviewed. None offered any confirmation of sexual abuse by counsellors, but the investigators felt that some of the witnesses were not being entirely truthful. By November 1991, the RCMP located one other potential complainant against MacDougall. They also spoke to an individual who made an allegation against another former counsellor, Murray Moore. However, they did not pursue the complaint as Moore had committed suicide in 1990.

A decision was made to take a 'task force' approach to the investigation. Further documentation was found at Shelburne in the form of the admission log books and the 1975 Supervisor's Daily Journal. The stated intent of the investigation at this point was to pursue allegations of repeated physical abuse, of assault causing bodily harm, or of physical assault that was said to have occurred during an attempt at sexual assault.

Many of the former residents contacted denied any knowledge of physical or sexual abuse by a counsellor. Some acknowledged receiving injuries at the school, but were emphatic that the injuries had occurred during events such as track and field and soccer and had nothing to do with counsellors. Several described inter-resident sexual activity. There were, however, isolated references to claims of physical abuse with attendant bodily harm. Some also described the use of force, such as being rapped on the head with knuckles or being picked up and shaken or thrown against a wall.

Six former and two current employees were interviewed by RCMP investigators in the months that followed. Staff members acknowledged that with one counsellor having to look after 40 to 45 residents it was no easy task to keep control, and that youths were often grabbed or shaken to make them stop misbehaving.

Two counsellors remembered receiving a complaint in 1975 of sexual abuse by MacDougall. They identified the victim as M.D. and gave names of possible witnesses. Michael Thorburne was one of the counsellors who received the complaint. He indicated that he had passed it on to his supervisor, and after that MacDougall had never returned to work at the school. He also told the police that there was a 'no physical force' policy in effect from the start of his tenure at Shelburne in 1967.

The RCMP interviewed M.D. He advised the police of two incidents. In the first, MacDougall tried to grab his penis; M.D. got up and walked away. The second incident was the one that led to the end of MacDougall's employment at the school. M.D. said he allowed it to happen. Knowing that MacDougall was sexually abusing residents, he and other residents set up a situation where MacDougall would be caught. M.D. put himself in a position where MacDougall would be tempted, and MacDougall took advantage of it by fondling M.D.'s penis. Other residents then came into the area and saw it happen. The incident was reported to other counsellors and it led to MacDougall's dismissal by the Superintendent, Barry Costello.[13]

Donald Lawrence Higgins, a retired Chief Supervisor who worked at Shelburne from 1953 to 1984, recalled a number of complaints that Patrick MacDougall was involved in sexual activity with boys. He once confronted MacDougall about these complaints in 1969, but the matter was dropped after MacDougall suffered some kind of attack and was admitted to hospital. Higgins also mentioned that Murray Moore had been the subject of a sexual complaint, but that the complaint had later been withdrawn when the resident claimed he had made it up because of punishment he had received from Moore.

One counsellor, George Allan Guye (known as Mickey), recounted that in the mid-1960s two boys reported that they had seen MacDougall with his hands down a boy's pants. The report was passed on to a supervisor, who decided there was no truth to the allegation. Guye claimed that during the 1960s physical abuse was an accepted way of life. Force was sometimes used when a staff member lost his temper, and sometimes when a staff member honestly believed that force was justified. New counsellors were told by older ones that using force was the only way to keep control. Guye declined to give a statement or to name anyone. He added that the school started to change when Barry Costello took over in 1970.

The RCMP calculated from entries in the Shelburne index cards and admission logs that during MacDougall's employment from September 1959 to June 1975 there were 2,693 residents.

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[13] As it turned out, despite Costello's action, MacDougall was not actually dismissed from the public service, but rather transferred to another institution.

Of that number, possibly 877 were under MacDougall's care, either in his role as counsellor or through Boy Scouts. Eighty-four were contacted,[14] and police reports indicate that many talked readily of their life at Shelburne. Some described their stay at the school as the best time of their lives. Others referred to it as being part of their past and did not wish to dwell on it. All denied being victims or witnesses to *sexual* assaults. With respect to *physical* abuse, the majority expressed the view that 'if you asked for it you got a rough time.' Those who claimed to be a victim of or a witness to physical assaults would not give statements. The nature of the assaults described were slaps or cuffs to the head, hair pulling, kicks and punches. The investigator concluded that corporal punishment was part of the life at Shelburne in the 1960s and early 1970s.

A statement was obtained from J.M., who initially said that he was abused by Peter Gormley (whom he described as a staff member, but who was, in fact, a fellow-resident). He described MacDougall as a really nice guy, a gentleman, and a good man. He said he had nothing against MacDougall, and that he respected him. However, in answer to a question from the RCMP investigator, J.M. later said the abuser was MacDougall, not Gormley.

Ultimately, nine charges were laid against MacDougall in August 1992: five counts of indecent assault and four counts of gross indecency. The complainants were Gormley, J.M., M.D., and two other former residents, C.C. and P.H. MacDougall pleaded not guilty to all of the charges. His trial began in Provincial Court on January 18, 1993 before His Honour Judge Joseph Kennedy (as he then was).

At trial, Gormley testified that he had once been anally raped by MacDougall, even though in two pre-trial statements he had described only incidents of fondling and oral sex. J.M. also testified to anal intercourse on one occasion, as well as extensive acts of fondling and oral sex. The remaining complainants testified to acts of fondling and oral sex.[15]

Former Superintendent Barry Costello was a witness at the trial. He testified that he had confronted MacDougall with the allegation of fondling M.D. and that, at the end of the meeting, he had dismissed MacDougall from his staff. Judge Kennedy did not allow the Crown to introduce into evidence the utterance attributed to MacDougall "Can you find some way to punish me other than firing me?". Other residents testified that they witnessed MacDougall fondling M.D. MacDougall testified and denied committing any indecent act. He claimed that the boys would vie to see who could sit on his lap.

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[14] Exactly how many of the 877 the RCMP tried to contact is unclear.

[15] The Crown also called two similar fact witnesses, E.W. and J.O.

On February 17, 1993, Judge Kennedy convicted MacDougall of five counts of indecent assault and one count of gross indecency. The other three charges of gross indecency were dismissed. On March 29, he was given a sentence of six years in jail.

Joseph McKinnon, Director of Personnel for the Department of Community Services, was also a witness at the trial. His evidence revealed that, shortly after being supposedly dismissed from Shelburne, MacDougall was in fact transferred to the Sydney Children's Training Centre to work as a night watchman. In a statement given to the RCMP on January 7, 1993, MacKinnon related that the Deputy Minister, Dr. Fred MacKinnon, had once advised him that there were problems in Shelburne with MacDougall. The Deputy Minister told him that "they" – presumably the Department of Community Services – needed to get MacDougall out of there, and to arrange a transfer as soon as he could. After some discussion, arrangements were made to transfer MacDougall to the centre in Sydney, with the same classification as before, but with a clear understanding that MacDougall would not have access to the children.[16]

On February 11, 1993, eight new charges were laid against MacDougall for indecent assault and gross indecency with respect to four complainants, K.S., J.G.O., J.O., and E.W. (the latter two having testified as similar fact witnesses at MacDougall's first trial). MacDougall pleaded not guilty on March 11, 1993, and his trial was scheduled for July 28, 1993.

One additional complainant, H.S., later came forward. He had previously given information to the RCMP alleging abuse at the hands of Karl Toft, a counsellor at the New Brunswick Training School. At the time, he had also claimed that he had been the victim of sexual and physical assaults by fellow-residents and counsellors while a resident at Shelburne. On April 12, 1993, he gave a statement to the Ontario Provincial Police in which he alleged that Patrick MacDougall had performed oral sex on him a dozen times. This resulted in an additional charge of gross indecency being laid against MacDougall on July 3, 1993.

On July 6, 1993, MacDougall appeared, without counsel, in Provincial Court. He entered guilty pleas to the counts of indecent assault involving the complainants K.S., J.G.O., J.O. and E.W., and to a count of gross indecency involving H.S. The presiding judge, Her Honour Ann E. Crawford, sentenced him to five years in jail, consecutive to the previous sentence, for a total period of incarceration of 11 years.

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[16] The RCMP confirmed the restrictions on MacDougall's employment in an interview with George Kingham, Superintendent of the Sydney Children's Training Centre.

(ii) *Nova Scotia School for Girls*

In January 1991, the RCMP division in Truro commenced an investigation into an alleged sexual assault committed by George Moss, a former counsellor at the Nova Scotia School for Girls ("NSSG"). The complainant was B.N. She was in the process of initiating a lawsuit over the matter, and the Deputy Attorney General asked the RCMP to look into it. This led to a comprehensive investigation of several complaints of physical and sexual abuse at the NSSG, which culminated in criminal charges against Moss and another former counsellor, Douglas Gerald Hollett.

Moss and Hollett were hired as counsellors at NSSG in the fall of 1975, along with Ronald Shea and Roy Mintus.[17] They were the first men to be hired as counsellors at the school. Complaints were eventually made against all of them except Shea.

In July 1976, while Hollett was still on probation, allegations were made that he had offered drugs to residents. The school administration found the allegations to be valid. His employment was ultimately terminated in October 1976.

On August 18, 1977, M.M., a former resident at NSSG, went to the school and complained that she had been sexually assaulted by Moss. She said he had kissed and fondled her. She also named another resident who had been subjected to similar abuse by Moss. Her allegations were not referred to the police for investigation, and no action appears to have been taken by management.

In 1979, a resident named A.L. ran away from the school. When she arrived home, she explained to her mother that she had run away because Moss had touched her inappropriately. Her mother complained to the school management and to the Director of Special Protection in the Department of Community Services. An investigation was started, but no further action was taken when Moss resigned. The matter was not reported to the police.

In 1982, Moss reapplied for a position as senior counsellor at the school. By letter dated May 31, 1982, Marilyn S. Brookes, Assistant Superintendent, and William Macleod, Superintendent, advised William Greatorex, Administrator, Family and Children's Services, of their grave concerns if Moss were to return to the school. They cited Moss' inability to follow directions and his "need" to relate in a physical manner to the residents. They made reference to A.L.'s complaint, commenting that A.L.'s mother's "original intent was to charge Mr. Moss; but with support and careful handling she appeared to back down somewhat." Despite this warning, Moss was hired in

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[17] Mintus had been a counselor at Shelburne. He transferred to NSSG in December 1975.

1985 by the Department of Social Services as a Social Service Worker, Family Benefits, in the Cape Breton regional office.

The first police investigation into Moss' conduct was carried out while he was employed in the Cape Breton office. In March 1988, Moss' son told the RCMP that he believed his father had molested girls from NSSG at a summer camp in 1975-78. He named M.M. as one of the victims. A complaint was also made that Moss had molested a family member, but it appears that the RCMP ultimately concluded there was insufficient evidence to lay criminal charges arising from that complaint.

The Department of Social Services immediately suspended George Moss without pay. Moss' wife advised the RCMP of a contemporaneous complaint made by M.M. M.M. confirmed the abuse in an interview with the RCMP. She also named B.A., R.G. and B.N. as possible victims. B.A. was interviewed and confirmed that sexual advances had been made by Moss. B.N. was also interviewed and she too said that she had been molested by Moss. No charges were laid in connection with these allegations at the time. It is unclear why the charges were not pursued.

Moss was fired in June 1988, but he grieved the dismissal. The matter went to arbitration in December 1989, solely in relation to the incident of alleged abuse against a family member. The Nova Scotia Government Employees Union ("NSGEU") conceded that, if proven, the allegation would justify dismissal. In a decision dated January 15, 1990, the arbitrator found that the Government had not established just cause for the dismissal because it had not satisfactorily proven that Moss had committed the abuse.[18] He ordered the Province to reinstate Moss. The Government brought an application for judicial review, but was unsuccessful.[19] Moss was subsequently offered a different position in which he would not have direct contact with clients.

As noted above, the RCMP began its investigation into allegations of sexual abuse at the NSSG in January 1991. Investigators quickly identified five persons, M.M., B.N., A.L., R.G., and C.B., who claimed they were abused by Moss. They also identified G.B.R. who complained about improper conduct by Douglas Hollett, and T.M., who alleged abuse by Roy Mintus. Further allegations were made by an ex-employee, Margaret Grant, who said that a counsellor, M.G., had grabbed residents in an inappropriate manner.

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[18] One of the former residents testified at the arbitration hearing to being kissed and fondled. The arbitrator made a finding that he was satisfied that Moss did engage in improper conduct towards students at the school, and that he was overly familiar with some of them and touched and kissed them in inappropriate ways. However, since Moss' suspension and firing were based solely on the allegation that he had sexually abused a family member, that was the only incident legally germane to the arbitration.

[19] *Civil Service Commission (N.S.) v. N.S.G.E.U.* (1991), 107 N.S.R. (2d) 24 (N.S.S.C.).

In June 1991, the Crown concluded that the only matter that would stand up in court was an incident involving M.M. and Moss. However, M.M. advised the RCMP that, at that point in her life, she was not interested in seeing her complaint pursued in the criminal courts. A decision was made that no charges would be laid at that time against Moss or any of the other suspects.

The decision not to lay charges against M.G. was apparently based on the fact that her conduct was in the nature of teasing or joking. The decision not to charge Mintus was made in light of the investigators' view that the complainant was a consenting party. While this may not have been a defence in law, it was felt that without other witnesses the case would not stand up in court.

The investigation continued. The police contacted every person identified either as a possible victim or as a witness to any act of alleged impropriety. Search warrants were also executed at the school to obtain records of former residents, staff, and contemporaneous reports of incidents where force was used. The police received complaints of assaults causing bodily harm, but decided that they were unfounded. The police also heard about incidents where staff had used force on residents, but determined that the use of force had always been justified and reasonable. Indeed, in many instances former residents agreed that staff members were justified in using force and that the force used was not in excess of what was necessary and reasonable in the circumstances.

On February 7, 1992, Hollett was charged with indecent assault, sexual intercourse with a female person 14 to 16 years of age who was of previous chaste character, and possession of a weapon for the purpose of committing an assault. He was alleged to have sexually abused a young resident who had escaped from the school and come to live with him. On November 26, 1992, after a trial before a judge and jury, he was found guilty of the sexual intercourse charge. He was sentenced on February 5, 1993, to imprisonment for a term of two years and four months.[20]

On February 19, 1992, Moss was charged with seven counts of indecent assault on a female in relation to seven different complainants (including B.N., A.L., M.M., and R.G.). He was arraigned in Provincial Court on March 3, 1992 and elected trial by judge and jury. His preliminary inquiry was to commence on July 23, 1992. Following media stories about Moss' arraignment, former casual employees at NSSG contacted the RCMP with offers to be witnesses as to the inappropriate nature of Moss' behaviour towards residents. Moss was immediately suspended without pay pending a review of the charges. Ultimately, a plea agreement was struck, and Moss pleaded guilty to four out the seven counts on October 9, 1992. He was sentenced to imprisonment for one year.

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[20] *R. v. Hollett*, [1993] N.S.J. No. 76.

In 1995 and 1996, the Department of Community Services received complaints from seven former residents that Roy Mintus had improperly touched and kissed them and provided them with alcohol. Mintus was suspended with pay on July 26, 1995, and dismissed on December 13, 1996. Mintus filed a complaint with the Labour Standards Tribunal, claiming that his dismissal was without proper cause. His complaint was heard over 13 days from May 1998 to March 1999. On July 2, 1999, the Tribunal found that the conduct complained of had in fact occurred and that it was just cause for dismissal. Mintus appealed, but later abandoned the appeal.

In the end, MacDougall was convicted of 11 charges of sexual misconduct involving 10 complainants. Moss was convicted of four charges involving seven complainants. Hollett was convicted of one charge. No charges were laid against Mintus or M.G.

III

Formulation of The Government Response

1. EVENTS LEADING TO THE GOVERNMENT RESPONSE

As discussed in the previous chapter, on February 5, 1993, Douglas Hollett, the former counsellor at the Nova Scotia School for Girls ("NSSG"), was sentenced for the crime of sexual intercourse with a female person 14 to 16 years of age of previous chaste character. On February 23, 1993, the complainant in the case, G.B.R., gave notice of an intended action against Hollett and the Crown.[21] On April 14, 1993, similar notices were given by the seven complainants in the cases against George Moss (the other former counsellor at NSSG who had been convicted of sexual offences in relation to former residents).

The plaintiff in the *Hollett* case alleged that Hollett had improperly touched her, fondled her on school premises, and convinced her to run away from school and live with him. She further alleged that during the 18 months they lived together, Hollett engaged her in frequent sexual activity, including intercourse. Her claim against the Province asserted negligent hiring, training and supervision. Prospects for settlement appeared attractive. The demands by the plaintiff were modest.

The complainants from the Moss prosecution commenced their action on July 30, 1993. It was directed solely against the Government, and litigators from the Department of Justice ("Justice") therefore assumed carriage of the case. Since the Department of Community Services ("DCS") was responsible for the institution where Moss had been employed, their input was sought. One of the responses by DCS came in the form of an August 13, 1993, memorandum to Reinhold Endres, Q.C., Director of Civil Litigation, from Martha Crowe, consultant on legislation/policy at DCS. Crowe referred to the fact that her Department was being sued for sexual assaults committed by three former employees, Cesar Lalo, Hollett and Moss. She suggested that a determination be made if similarities in the cases against the Government justified a common approach.

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[21] Section 18 of the *Proceedings Against the Crown Act*, R.S.N.S. 1989 c. 360, stipulates that no action shall be brought against the Crown except on two months notice.

A further memorandum from Crowe to Endres, dated September 27, 1993, proposed a systematic approach to deal with cases where staff are convicted of a crime and there are consequent civil proceedings. She wrote:

> We wish to propose to you, for your consideration, that in cases where staff are convicted of a crime against a client, and that client subsequently sues for damages arising out of that crime, that we should have a mechanism to objectively assess their injury and the compensation that might be appropriate. We are not particularly interested in litigating the Moss, Hollett, or Lalo matters but we are open for your advice on that issue. We believe that there is some merit in recognizing that staff did commit a crime, that clients were injured and that injury occurred while they were "in our care". Therefore, we feel, rightly or wrongly, some obligation to compensate for that injury.

Counsel from Justice were cautious in exploring a settlement in *Hollett*, given the potential for other actions to be brought. Their advice was to work through the various files to develop a policy to permit consistent treatment, rather than move directly to settlement. This desire was communicated to plaintiff's counsel in *Hollett*.

DCS reluctantly agreed to postpone concluding any settlement until discoveries were complete. Defences were filed in the *Hollett* and *Moss* actions.[22] The defences were similar. The Province claimed that it was not negligent in the hiring, training and supervision of its employees, not vicariously liable for the acts complained of, and not in breach of any fiduciary duty to the plaintiffs. The Province also pleaded contributory negligence and the *Limitation of Actions Act*.[23]

Discoveries were held in the *Hollett* proceedings, but the case brought by the seven claimants from the Moss prosecution lay dormant for almost a year. On March 23, 1994, a little more than a year after the first conviction was entered against Patrick MacDougall, a notice of intended action by one of his victims was delivered to Justice. The notice was forwarded to DCS since it was responsible for operating Shelburne at the time of the conduct that led to MacDougall's convictions (and, indeed, until August 1, 1994, when the administration was turned over to Justice).

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[22] The Province also named Moss as a 'third party' in the lawsuit, in an attempt to claim over against him for damages should the Province be found liable. This was unnecessary in *Hollett* since he was named as a Defendant.

[23] S.N.S. 1982, c. 33. The Act prescribed that an action must be commenced within two years of the event. However, it also endowed a court with a discretion to permit an action to proceed, in certain circumstances, even though instituted outside the prescribed period. The Act was amended in 1993 to provide that the limitation period does not begin to run where the plaintiff is not reasonably capable of commencing the proceedings due to a physical, mental or psychological condition caused by sexual abuse: see S.N.S. 1993, c.27.

In late April 1994, Douglas J. Keefe, then Executive Director of the Department of Justice, received a draft memorandum from Martha Crowe directed to the Priorities and Planning Committee ("P&P").[24] The subject was a "Compensatory Scheme for Victims of Physical or Sexual Abuse Perpetrated by Former Staff of the Department of Community Services." Although this was purely a draft document, it is of importance since the Compensation Program that followed, at least in philosophical terms and rationale, reflected to some extent the ideas expressed in the memorandum.

By way of background, the memorandum stated as follows:

> The Department of Community Services is presently defending three civil actions by individuals who were abused by former staff.
>
> We have received a Notice of Intended Action in relation to a fourth victim of abuse perpetrated by a fourth staff member [MacDougall].
>
> In all four cases the staff persons involved have pled guilty to or have been convicted of the offense.
>
> The Department of Community Services is interested in establishing a mechanism to objectively assess the injuries suffered by the victims and to provide redress for these injuries through compensation and services.
>
> The Department believes, that since staff with the Department did commit a crime against these individuals and these individuals have suffered as a result, it is proper to recognize the harm suffered by these individuals and to attempt to redress that harm.

The memorandum then spelled out four options. The first was described as litigating every claim. This option was not favoured as it would make victims tell their stories again in a public forum to get redress. From a public relations point of view, it was thought that the Government would appear to have forced another travesty on the victims by requiring them to seek their redress in an arena not considered "victim friendly."

The second option was to settle each claim individually as it came forward. The draft identified one problem with this approach: it would be difficult to construct a mechanism that would be "fair" to all those who came forward. The Government would become the principal arbiter of what was fair, and that would put it in an awkward position, leading to a perception that it had embarked upon a 'divide and conquer' strategy. The memorandum suggested that the Government had to demonstrate credibility in whatever process it undertook.

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[24] Priorities and Planning is a committee of Cabinet, established to oversee government policy. It is usually made up of senior members of Cabinet. Approval by P&P is a powerful indicator that the full Cabinet will likely adopt the policy.

The third option was described as lumping all the individuals together and settling all the claims at one time. This was seen as not serving the short and long term therapeutic needs of the victims. Furthermore, the Government would be perceived as being irresponsible. It was suggested the Government needed to be seen not only to have given some money in compensation for the wrongs done, but also to have made a proper attempt to heal the damage resulting from these wrongs.

The fourth option was to appoint a facilitator, independent of the Government, to engage "all the parties" in a process that would allow for a resolution involving both monetary payments and Government support services. This was referred to as the model looked upon favourably in Ontario, British Columbia, Manitoba and Newfoundland. All parties would make independent submissions and be entitled to legal counsel. Consideration would be given to funding for medical and dental needs, further education, and counselling, administered by a public trustee, along with a screening process to "delineate the real claims."

This last option was considered a "win-win situation," with the Government being seen to have acted to meet the needs of the victims, yet ending up paying less money than in a process that would involve all victims suing the Government. This option was the recommended approach.

The draft memorandum did not result in immediate strategic planning on any of the options set out. Mr. Keefe cautioned the Deputy Minister, Gordon D. Gillis, Q.C., that it may be wrong to assume liability, and he added, somewhat prophetically, that the Department of Community Services may be setting up a rich obligation that Justice would have to pay for. He suggested that alternative dispute resolution ("ADR") was worth considering should liability be acknowledged, in which case it may offer significant advantages to both the Crown and the victims.

Nothing further was apparently done until Peter Felix Gormley, one of the victims of Patrick MacDougall, filed his Originating Notice and Statement of Claim and served it on Justice on June 22, 1994.[25] The claim set out allegations of sexual and physical abuse perpetrated on the plaintiff by MacDougall and others, and it asserted a claim for negligence and other breaches of duty by the Province. In addition to damages for pain and suffering and loss of income, Gormley sought $2,000,000 for punitive and exemplary damages.

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[25] By this time discoveries had been completed in *Hollett*, and the case was in the process of being set down for trial. DCS reasserted its desire for a settlement. Without detailing the various positions, settlement offers were exchanged, but the parties failed to agree.

Alison Scott, then Senior Solicitor in the litigation division of Justice, circulated the Statement of Claim within the Department. She noted that MacDougall had 10 other convictions respecting 10 other boys.[26] The Deputy Minister alerted the Minister, the Honourable William Gillis, that "this is a very small part of a very big problem." The Deputy Minister indicated he would endeavour to develop an overall plan rather than deal with one case at a time. Since there were no provisions in the budget, P&P would have to approve such a plan. Arrangements were made to try to work something out later in the summer.

In a memorandum to the Deputy Minister dated June 28, 1994, Ms. Scott set out the available defences and sought instructions on whether to handle the *Gormley* case by litigation or by an attempt to settle (or possibly both). She noted that, in most cases, general damages for similar cases had not exceeded $65,000. One of the options identified was to make some sort of admission on liability, but refer the issue of damages to the Court. The Deputy Minister was committed to examining a new approach, but otherwise authorized the continuation of the litigation process for this claim. Approval was given to at least proceed to the discovery process to determine the extent of liability and the viability of any defences.

Ms. Scott attended Shelburne in search of records. She reported that no records were available except for those relating to admission and discharge of residents: retention practices then in force did not require that other records be kept. She promptly interviewed various DCS personnel to obtain their recollections of the events at the school. She spoke also with former staff from head office and from the school. She was told of the existence of shift log books and incident report forms, but obtained no hard information as to where they were. Nor was she able to determine what happened to records from the 'isolation unit' (purportedly a place where residents were housed either for their own protection or to protect others from them). She was advised that in the early 1960s the primary means of enforcing discipline had become the removal of privileges or assignment of work; physical force was only acceptable to protect a child from himself, others, or in self-defence.

Counsel for the plaintiff in the *Gormley* case wrote to Alison Scott in early August. In a detailed and forceful manner, he urged full public disclosure of the events at Shelburne, either through a public inquiry or in the course of a trial. Nonetheless, he suggested that if a proper offer was made it would be in his client's interest to settle the case. He set out a claim for slightly in excess of $1,000,000. Reference was made in the proposal to the apparent acceptance by the Province of an obligation, albeit non-legal, to provide compensation to Donald Marshall[27] and to the recent payment of $500,000 to the family of Donald Findlay, who was killed by a fellow inmate while at the Halifax Correctional Centre.

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[26] In fact, it was nine, not 10, other boys.

2. FORMULATION OF THE THREE-PRONGED RESPONSE

At a summer retreat, most likely in early August 1994, a strategic planning session was held to discuss the formulation of an overall plan. In attendance was the Deputy Minister of Justice, and the Department's Executive Director, Director of Policy, Executive Director of Correctional Services, and Director of Communications.

Out of this retreat emerged a draft memorandum to P&P. It was sent first to the Department of Community Services, and then, along with the response from DCS, to the relevant officials at Justice. The memorandum was submitted to P&P with some minor changes in wording on September 30, 1994. Due to its importance in understanding the Government's response, the full text of the memorandum is reproduced as Appendix "C".

The stated purpose of the memorandum was to evaluate and develop appropriate responses to incidents of sexual abuse at Shelburne. It set out the background as follows:

> A lawsuit has been commenced naming the Province as a defendant seeking damages for sexual assaults committed upon the Plaintiff, Peter Felix Gormley, while in the custody of the Shelburne Youth Centre. The assaults were committed by a staff member during the mid-to late-1960's (there was a conviction).
>
> .....
>
> In addition, two further Notices of Intended Action have recently been filed,[28] and it is expected that there will be a significant number of additional claims advanced within the near future.[29] There is a major difficulty in discovery and assessing the factual situation as some of these incidents are alleged to have taken place many years ago.

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[27] See Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations* (Halifax: The Commission, 1989).

[28] Both notices were given by complainants in the criminal prosecution of Patrick MacDougall.

[29] Indeed, five more notices of intended action were received over the next few months.

The stated objective was:

> To determine the cost-effective, timely process for responding to actual and alleged incidents of sexual abuse at the Shelburne Youth Centre which will be acceptable to victims and the public.

The memorandum went on to identify the factors that should be considered in developing an appropriate response:

> (a) victim & public confidence or satisfaction – there needs to be an assurance that justice has been done; that victims have been fairly treated through a process which is seen as fair and impartial.
>
> (b) the need to ensure that corrective actions have been taken with policy and procedure in place to ensure that future incidents will be prevented;
>
> (c) the reputation of the Government and the Department – their response to the issue is thorough and conscientious and that those responsible are held accountable for their actions;
>
> (d) the confidence and peace of mind for families of children currently in custody;
>
> (e) the time frame involved;
>
> (f) the cost of the process and compensation;
>
> (g) impact on staff currently employed.
>
> (Underlining in the original.)

The memorandum identified three options: 1. traditional litigation, 2. a public inquiry, and 3. investigation, audit and an alternative dispute resolution process. In terms of assessing these alternatives, the basic premise was advanced that the Government is obligated legally and morally to respond to this issue and that

> ... it is essential that any process ensures that there be *proper accountability for actions*, that *the truth be ascertained*, that *fair compensation be paid* and that there are assurances that necessary or remedial action has been or will be taken. (Emphasis added.)

Option I – Traditional Litigation

This was described as denying liability and putting the plaintiff to strict proof of all allegations. It was considered that, compared with other options, costs would be controlled in terms of compensation and legal expenses. The time frame would be about two years. There would be some impact on staff, but not nearly as great as with an investigative process. However, it was anticipated that public satisfaction would be low as it may appear that the victims were being re-victimized by the process. The Government could be accused of taking a narrow perspective and of being unwilling to make a proactive positive response. It was asserted that the reputation of the Government and the Department of Justice would suffer, that more broad-based inquiries had occurred in other provinces and that Nova Scotia would be perceived as avoiding its responsibilities.

Option II – Public Inquiry

This was referred to as the traditional response and probably the safest for that reason. The victims, through their lawyers, would be perceived as having their needs addressed, but the spectacle of victim testimony might ultimately be damaging to them. Although the public might appreciate the visibility, the public would likely have a negative view of the expenditure of considerable public funds for legal services. The option would also have a negative impact on the reputation of the Government and the Department. Corrective action would have to be assessed after the inquiry. Attached as schedules to the memorandum were the time frames and costs of the public inquiries in Newfoundland (Mt. Cashel) and New Brunswick (Kingsclear).

Option III – Investigation, Audit and an Alternative Dispute Process

This was clearly the favoured option – one that was said "to achieve success at outcomes while avoiding the problems associated" with Options I and II. The investigation would be done by an independent fact finder, who would obtain and assess information with appropriate investigatory and legal assistance. The justification was that the Government officials "need to know what events took place, what information was shared with senior managers and what actions then occurred." It was expected that the investigation could be completed within 90 days. An independent audit of present practices would also be conducted to ensure that current policies and procedures were adequate to protect residents.

An alternative dispute resolution process would be available if liability was revealed through the investigation. Three methods of ADR were described as available: negotiation, mediation (a process where a neutral mediator assists the parties in arriving at a consensus), or adjudication (a process where a neutral third party is given the power to make a binding decision).

The most significant risk identified in proceeding with the third option was the public perception that the Government was being evasive in not having a public inquiry. This was dealt with in the following way:

> One of the major functions of the public inquiry is to establish responsibility. That would be acknowledged up front in option III. An appropriate communication strategy would reinforce the notion that Government is prepared to accept responsibility, and would prefer to expend limited resources on compensation for victims and improvements to the juvenile justice system rather than lawyers' fees. (Underlining in the original.)

It was recommended that Option III be approved in principle and that Justice be requested to prepare a detailed work plan containing the terms of reference for the process. The recommendation was approved by P&P on October 6, 1994.

3. ANNOUNCEMENT OF THE GOVERNMENT RESPONSE

An October 25, 1994 memorandum prepared by Kit Waters, Director of Policy for Justice, was submitted to Cabinet by the Minister of Justice. The objectives of the memorandum were stated to be: 1. to advise the Executive Council regarding the recommended course of action; 2. to seek approval for the Minister of Justice to initiate an independent investigation of alleged incidents of sexual abuse at the (former) Shelburne School for Boys; and 3. to seek approval for the Minister to initiate an independent audit of present practices at the Shelburne Youth Centre.

The memorandum recommended that a judge be appointed to undertake the independent investigation. It was recognized that the person chosen must be well respected and perceived as neutral and at arms length from the Government. In the event that the investigation was unable to obtain sufficient information to make recommendations to the Minister, the investigator could urge the Government to establish a public inquiry. It was also recommended that the report of the investigation be made public within two weeks of its receipt by the Minister, and that the identities of the complainants be protected.

In relation to the proposed audit, it was recommended that the terms of reference require the auditor to inquire into, report on and make recommendations in relation to the protection of persons held in custody at Shelburne. In particular, it was suggested that the auditor examine the complaint procedure and that an assessment be made of the mechanisms in place "to ensure proper communication and follow-up within responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody." The Minister was advised to retain an independent auditor *with acknowledged expertise in custodial institutional policy and procedures*,[30] and to make the report public within two weeks of receipt.

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[30] In Chapter IV, the qualifications of the person who was chosen as auditor are discussed.

These proposals were approved by Cabinet on October 27, 1994.

On November 2, 1994, the Honourable William Gillis, then Minister of Justice, advised the House of Assembly of the Government's intentions regarding "a response to incidents of sexual abuse at the Shelburne Youth Centre, formerly the Shelburne School for Boys." He told the House that the Government intended to proceed with a three-step process.

The first step was to be an independent audit of current practices at the Shelburne Youth Centre and other young offender institutions operated by Justice. This was to ensure that existing policies and procedures prevented any recurrence of abuse and to assure current residents and their families that young people in custody are safe and secure. Ms. Viki Samuels-Stewart, then Assistant Manager, Employment Equity, with the Atlantic Regional Office of the Bank of Nova Scotia, agreed to undertake this audit.

To demonstrate the government's accountability in this process, the Minister undertook to make the results of the audit public. It was to start on or before December 1, 1994, and its projected completion date was February 28, 1995. The projected cost was $36,000.

The second step was to be a thorough, independent investigation into the events that took place at Shelburne in order to determine what happened, who was involved, who knew what was happening and what actions were taken.

According to its Terms of Reference, this "comprehensive investigation" was to determine "the extent of sexual and physical abuse of boys housed in Shelburne" and, in particular, "whether any staff other than Patrick MacDougall engaged in sexual abuse of children." Practices and procedures in place at Shelburne "that permitted or hindered detection of abuse of children" were to be examined, as was "the state of knowledge of senior officials within the institution and the Department of Community Services as to abusive behaviour of staff towards children from 1956 to 1975." Finally, the investigator was to establish "what steps were taken at the Children's Training Centre in Sydney, where Mr. MacDougall was transferred from Shelburne, in order to ensure that children in Sydney were not placed at risk."

This investigation was to be directed by a person completely independent from the Government of Nova Scotia, given "the allegations of misconduct against Government officials." The findings of the investigation would be made public, although the identity of the complainants would be protected. The investigation would include, at a minimum, interviews with police officers involved in the criminal investigations, victims, employees at the school during the period in question, medical staff responsible for the treatment of victims, and government officials and administrators.

It was recognized that witnesses would "have the prerogative of refusing to assist the investigation, leaving us with the option of proceeding via the public inquiry route." However, the Minister stated that many people had already indicated their willingness to speak with an independent investigator.

The investigation was to start on December 1st, with a targeted completion date of March 31, 1995. The budgeted cost of this investigation was $75,000.

The third step was to be the offer of compensation to victims through an alternative dispute resolution process if liability was revealed through the investigation. Models of such processes in other jurisdictions were being examined.[31] The contemplated process was to bind both parties: the victims and the Province. The adjudicator was to be selected based on experience and independence. The ADR process was to provide "fast and fair" compensation to victims and would be offered as a substitute for civil litigation. Individual complainants were to be free to pursue this matter through civil litigation. The reports of the adjudicator would be made public.

The three-pronged response was intended to ensure that victimization not recur, determine what happened and who was responsible, and provide fair compensation for victims, all in a reasonable amount of time and at a reasonable public expense.

In favouring this alternative approach, the Minister cited the costs of the New Brunswick and Newfoundland public inquiries, and the lengthy delays in compensating victims resulting from these inquiries. He stated that "the timetable for this three-step process should see us in a situation where compensation negotiations with victims can start approximately six months after this process begins." He advised that the expected costs involved in the investigation and the audit would be a fraction of the cost of a public inquiry. As well, the proposed approach, unlike a public inquiry, would not require victims to testify again in a public setting. Many of the Shelburne victims had already testified at the trial of Patrick MacDougall. The government wanted to provide those who had been gravely injured the opportunity to tell their stories without a public spectacle that would re-victimize them.

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[31] As early as the fall of 1993, Barbara Patton, an articling clerk at Justice, spoke with Thomas C. Marshall, Q.C., General Counsel with the Ministry of the Attorney General of Ontario. She requested information about cases in that Province where non-traditional responses had been considered.

The Leader of the Opposition, Terence Donahoe, responded to the Minister's announcement with the following words: "Overall, I am absolutely delighted and I say sincerely, I applaud the Minister for proceeding in the fashion he has." At the same time, he expressed some concerns. He was worried that the allotted time frame might not allow the investigators sufficient time to perform their tasks. He also offered that "we may be selling ourselves short in terms of having a full, complete and total analysis of the events if we do not have those who are conducting the investigations able to compel the attendance of a witness or witnesses as required."

The Leader of the New Democratic Party, Alexa McDonough, also applauded the Minister's statement and the direction he took. She said "the general thrust of the Minister's announcement is to be welcomed. It seems to me it is sensitive, it has due regard for the range of matters that need to be addressed in public policy, as well as in terms of personal compensation." She expressed some concern over the Minister's "pre-occupation ... with cost-effectiveness," but she also declined to reject out of hand the suggested alternatives to a public inquiry. However, the following day she said that the Government's response had unleashed a number of very angry phone calls from victims and their lawyers "who have experienced to date nothing but total obstructionism from this Government in regard to claims for compensation that they have already tried to make." She suggested that the victims could have no confidence in the sincerity of the Government when it had used "every kind of delaying tactic, stalling tactic and attempt possible to frustrate the bid for justice that has been launched by some victims already."

On November 7, 1994, the Minister of Community Services, the Honourable James Smith, advised the House that the Minister of Justice had acceded to his request to broaden the scope of the Government's response. It would now include an examination of residential facilities that either had been operated or continued to operate under the aegis of DCS, as well as an examination of the Cesar Lalo case. (Lalo was a probation officer who had been convicted of sexual offences against young persons under his supervision. Although he did not work in a residential facility, recent media reports had cast suspicion on the way the matter was handled by the Government once allegations of sexual misconduct on Lalo's part became known.[32])

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[32] Dr. Smith further advised the House that, contrary to media reports, immediately upon hearing rumours of a possible criminal investigation into Lalo, the Department of Justice contacted the RCMP to confirm that such an investigation was underway. Once this was confirmed, the Department carried out its own investigation that resulted in Lalo being assigned new duties and, within approximately four months, his employment terminated. The termination was grieved, and ultimately there was agreement to accept his resignation.

The Minister also informed the House that he had appointed Ross Dawson to conduct an operational review of centres operated by the Department of Community Services. The Minister said:

> I wish to advise the members of the House that my department has asked Mr. Ross Dawson, an internationally-recognized expert in the development and provision of child abuse services, to conduct a full operational review of the Nova Scotia Residential Centre. Mr. Dawson's review will be much broader in scope than an examination of the procedures in place to ensure the safety and security of the residents. It will include a review of the current practices and procedures at the centre to ensure an appropriate standard of care is being provided. As part of his review, Mr. Dawson will also examine the policies and procedures of the Nova Scotia Youth Training centre with particular emphasis on the safety and security of the residents.

On December 1, 1994, the Minister of Justice announced that the former Chief Justice of New Brunswick, the Honourable Stuart G. Stratton, Q.C., had agreed to undertake the independent investigation announced in November. He noted that Mr. Stratton had recently chaired a review panel which examined allegations of abuse at the reformatory in Kingsclear, New Brunswick, leading to the establishment of the Miller Inquiry into those allegations. Mr. Stratton would retain and direct qualified and experienced investigators.

The Minister noted that, without constraining Mr. Stratton, the primary focus of the investigation would be from about 1956 to the mid-1970s. The Terms of Reference would include the Nova Scotia Youth Training Centre in Truro, the Nova Scotia Residential Centre in Truro, and the Children's Training Centres in Sydney and Dartmouth. Due to the expanded nature of the investigation, the report was now expected by June 30, 1995. The budget was increased to $140,000. Mr. Stratton would take such measures as he felt necessary to protect the privacy of the victims.

Mr. Stratton asked the Minister to point out that "the success of this innovative process will require the cooperation of all those people who were, or are, involved in any way." The Minister assured Mr. Stratton of the Government's complete cooperation and expressed his confidence that others will be equally cooperative. The Minister concluded that "[t]his plan, of course, leaves us with the option of proceeding with a public inquiry, should that prove necessary."

Mr. Donahoe welcomed the breadth of the new Terms of Reference, but expressed concern that the Minister might have been better advised to confer upon Mr. Stratton powers under the *Public Inquiries Act*, including the power to subpoena and compel the attendance of witnesses. He questioned whether some individuals who would surely be found to have been involved in some of these matters were likely to cooperate. The Government's approach, he said, "may prove to, almost inevitably, lead us to the situation where a great deal of information will be gathered, but that a conclusion may well have to be reached as was the case in the Kingsclear situation, where a very difficult, protracted and contentious review of this kind was then, in fact, followed by a full scale inquiry."[33]

Ms. McDonough also expressed her lack of faith in the sufficiency of these procedures and the powers of Mr. Stratton in the face of "reluctance to fully cooperate, because of people who will surely incriminate themselves or be in a position of pitting themselves against others, in some cases others under whom they have served in previous or current employment situations." She did not foresee how Mr. Stratton's task could be completed without a public inquiry. Indeed, she reflected that the Government may have created a situation that will be more costly, even more time consuming and even less likely to protect the interests and privacy of the victims.

Ms. Samuels-Stewart's report, entitled '*In Our Care': Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre – Waterville*, was made public on March 19, 1995. It is discussed in detail in Chapter IV.

On June 30, 1995, Mr. Stratton submitted his report to the Minister of Justice. It is dealt with at length in Chapter V.

4. ANALYSIS

Much of my evaluation of the Government's three-pronged response will be found in subsequent chapters, where the Samuels-Stewart audit (Chapter IV), the Stratton investigation (Chapter V), and the creation and implementation of the Compensation Program (Chapters VI to XII) are described in detail. However, some early comments are warranted here.

It was appropriate, even commendable, that the Government recognize the need for an audit of its institutions to protect its current residents and ensure that policies and procedures were in place to prevent future incidents. Although I take some issue with how the Samuels-Stewart audit

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[33] The review referred to by Mr. Donahoe was conducted by a three person committee composed of the Honourable Stuart G. Stratton, Q.C., Wade McLaughlin, then Dean of the New Brunswick Law School, and Harry Nason, Secretary to the Executive Council. It was given the responsibility to prepare a report on whether there were reasonable grounds to believe that government employees failed to take appropriate action. It met over a period of five weeks and filed a report on November 12, 1992, recommending a public inquiry.

was conducted, the Government was well motivated in directing that an audit be conducted to this end.

It was also appropriate that the Government recognize that the extent of sexual and physical abuse needed to be determined, as well as the state of knowledge of senior officials. No one could quarrel with the desirability that the true facts be known and that persons be held accountable for wrongdoing.

The strategy becomes questionable when one examines the nature of the investigation that was established and the Government's commitment to an ADR program of undefined shape and size, if the investigation found liability.

The commitment to an ADR process found its origin in the Government's early thinking on how to respond to civil suits initiated by individuals whose victimization had been established in the criminal courts. It was not surprising – indeed it was laudable – that DCS would suggest that a purely adversarial response to these civil suits would not be appropriate. As will be developed later in this Report, where criminal convictions have been registered against Government employees for their abuse of residents, one would expect the Government to consider a means to avoid a process that compels those residents to again prove their victimization to obtain compensation.

That being said, the announced three-pronged response was not confined, by its terms, to these claims, but was purportedly designed to determine the full extent of abuse, and then compensate its victims through an ADR process. How could the investigation to be conducted by Mr. Stratton serve that end? Its duration was to be short, its resources limited. It was unlikely that such an investigation could be regarded as either "thorough" or "comprehensive." Mr. Stratton had no statutory power to compel the production of documents or the testimony of individuals. Indeed, it was obvious that Mr. Stratton would not be conducting formal hearings or subjecting individuals to cross-examination by parties adverse in interest. It is, therefore, difficult to see how Mr. Stratton could find liability, except in those cases where abuse was uncontested or where it had been established in the criminal courts. As will be developed in later chapters, I am of the opinion that Mr. Stratton's investigation could not properly yield findings, given its mandate and the way it was conducted. The Government placed mistaken reliance upon this investigation to create a Compensation Program with little or no verification of individual claims.

In designing the investigation to be conducted by Mr. Stratton, the Government was obviously seeking to avoid resort to a public inquiry. This may have been understandable, given the Government's perception that public inquiries elsewhere into institutional abuse were expensive, *time consuming and unnecessarily delayed the compensation of true victims of abuse. However, these very attributes reflect, in part, that findings of credibility cannot accurately and fairly be made without certain procedural safeguards – some of which are time-consuming and costly. Sometimes, justice requires no less. The September 1994 memorandum to P&P contemplated a communications strategy that would stress that a public inquiry's main function, establishing responsibility, was unnecessary since the Government was prepared to accept responsibility "up front." But responsibility for what? The suggestion that, before the extent of abuse and the involvement of senior management had been determined, the Government would accept some sort of open-ended responsibility may have foreshadowed the later design of a Compensation Program that too readily was prepared to accept abuse allegations without meaningful verification.*

None of this is to say that the Government was compelled to establish a public inquiry. I later discuss other more nuanced options than those adopted by Nova Scotia. For instance, the Government could have moved immediately to a compensation regime for those shown to be true victims by the criminal process. As for other claims, the Government might have simply allowed the Stratton investigation to collect evidence to assist it in designing its further response, recognizing the investigation's inability to make contested findings of fact. Or it might have dispensed with such an investigation altogether in favour of reliance upon further criminal or disciplinary proceedings or a true arbitration process that was procedurally fair to all interested parties.

The Government appears to have ill considered the interplay between the three-pronged strategy it had adopted and the criminal and disciplinary process. For example, there had been lengthy prior investigations conducted by the RCMP at Shelburne and at Truro. These had led to criminal charges against MacDougall, Hollett and Moss. There was a remarkable lack of interest within Government as to what these investigations had already determined, rightly or wrongly, about the extent of abuse within its institutions. As well, there appears to have been little or no consideration given to the implications of the Stratton investigation upon any future police investigation. Indeed, there is no indication that the RCMP was consulted on the impact of the Government's three-pronged response on its ability to further investigate criminality. This theme is revisited when I later discuss Mr. Stratton's and the Government's commitment to allow complainants to decide whether their statements would be provided to the police.

Similarly, there appears to have been little or no consideration given, when the Stratton investigation was formulated, as to how it would interrelate with future disciplinary proceedings against current employees or management. Put simply, in the formulation of the Government strategy, accountability was stressed, without any explanation as to how such accountability would take place. (This was only addressed later in the Government program and, in my view, *inadequately.) As well, when one recalls that the Government formulated a three-pronged strategy in part to avoid gratuitously re-victimizing those subjected to abuse, it is surprising that inadequate attention was given to the implications of a strategy that might ultimately compel complainants to describe their alleged victimization to the Stratton investigation, to criminal investigators and again to Department investigators.*

It is also surprising (as earlier noted) that a clear distinction was never drawn in the formulation of the Government strategy between claims already found to be valid within the criminal process and other claims. From the outset, these situations should not have been lumped together. Almost invariably, where criminal liability has been found beyond a reasonable doubt, the facts pertaining to the abuse itself need not be re-investigated. The facts are known. The three options developed for Cabinet's consideration failed to articulate a strategy that drew this important distinction.

One has to question generally how the various options were presented to the Government. For example, Option I – Traditional Litigation – was described as denying liability and putting the plaintiff to strict proof of all allegations. In my view, this was an inaccurate description. As will be developed in this Report, traditional litigation permits the Government, as a litigant, the flexibility to evaluate the merits of each case, to settle cases of obvious merit, to admit liability and dispute the issue of damages only and, equally important, to litigate – even in highly contested matters – in a way that is respectful of the litigants and the nature of the allegations made. This is not to say that Option I was the only approach or that it could accommodate the needs and privacy interests of true victims of abuse to the same extent as an ADR process. However, the above description of traditional litigation virtually compelled the Government to reject this as an option to address allegations of institutional abuse. Furthermore, while investigations play an important part in the administration of justice, in and of themselves they are inadequate to address issues of public accountability or to make definitive findings of fact.

IV

The Samuels-Stewart Audit

1. THE AUDIT'S MANDATE

In November 1994, the Government of Nova Scotia directed that an independent audit of provincially operated young offender institutions be undertaken to ascertain whether current practices were adequate to ensure the safe custody of young persons confined within the institutions. Viki Samuels-Stewart was appointed as auditor.

The Terms of Reference for the audit were as follows:

> During the period commencing on the 1st day of December 1994 and ending on the 28th day of February 1995 to inquire into, report and make recommendations to the Minister of Justice in relation to
>
> (a) whether persons held in custody in the Shelburne Youth Centre and other young offender institutions operated by the Province are adequately protected against sexual and other abusive conduct;
>
> (b) whether there is an adequate system in place to ensure that, in the event of such improper conduct, complaints may be made, received and acted upon in a timely and effective manner; and
>
> (c) whether there are in place appropriate mechanisms to ensure proper communication and follow up between responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody.

Although the Terms of Reference included all provincially operated young offender institutions, Ms. Samuels-Stewart limited her review to the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville, primarily due to the short time frame allotted for the audit. The

Shelburne Youth Centre housed both male and female young offenders.[34] The Waterville Youth Centre housed only male young offenders.

In March 1995, Ms. Samuels-Stewart completed her report, entitled *'In Our Care' - Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville*. The report was made public by the Government on March 29, 1995.

2. CONTENTS OF THE REPORT

(a) Introduction

What follows is a detailed summary of what the Audit Report says, without editorial comment on my part. An analysis and evaluation of the Report follows.

(b) Process and Participation

The Report indicates that the 'process' format of evaluation was adopted. This type of evaluation was said to involve primarily reviewing program records, interviewing staff and clients, and making qualitative observations. It focuses on the involvement of those most affected by the institutions: in this case, the residents and employees. The Report states that this is a useful approach for evaluating developing programs, such as were those at Waterville and Shelburne, which can be done quickly and with minimal resources. The Report further states that this approach was "deemed to be exploratory in nature to make certain determinations, from which recommendations for future action would follow."[35] The Report also notes that a process evaluation should be seen as an initial evaluation only.

The Report points out that its prime focus was the issue of abuse. Particular attention was paid to how young offenders, employees and others associated with the institutions understood abuse, whether young offenders currently in custody were protected from abuse, and whether those young offenders currently in custody were being abused. In her task, the auditor was aided by two administrative assistants with experience in research, report writing and data analysis.

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[34] Shelburne also housed young persons who had not committed any offence (but for whom no other home could be found). However, in order to conform to the language of Ms. Samuels-Stewart's Report, I will refer to Shelburne residents in this chapter as "offenders."

[35] This, and other quotations which follow, are taken from the Report.

The Report indicates that information was gathered through:

- Review of documents from Waterville and Shelburne. Waterville documents included the four-volume policy and procedure manual and the journal program which young offenders and staff use to communicate their daily individual concerns. Shelburne documents included the programs/operations binder, the November 1994 Manual of Directives issued by Correctional Services, October 1994 memos to staff from the Superintendent respecting procedures for reporting child abuse and abusive or inappropriate behaviour, an October 1994 memo to residents from the Superintendent respecting the reporting of abuse, various forms, program schedules and program manuals for young offenders, program reviews conducted in August 1987 and March 1991, and 16 young offender files. Additional documents are listed at pages 8-10 of the Report.

- Review of the *Young Offenders Act* and Regulations (as of 1993), the *Review of Children's Training Centres in Nova Scotia - A Report & Recommendations to the Minister of Community Services* (October 1994), a Report of the Solicitor General's Special Committee on Provincially Incarcerated Women (April 1992), the *Female Young Offender Review*, Department of Community Services (March 1993), and a letter from the Elizabeth Fry Society to Correctional Services expressing concern over the program offered to female offenders (October 1994).

- On-site visits and tours. The auditor also asked to be put through the admission procedure. This included a description of pat search and strip search procedures.

- Informal discussions with staff and formal discussions with the respective Superintendents and Managers.

- Focus groups. Twelve were conducted, involving separate groups of offenders and employees at both centres.

- Questionnaires, which were distributed to all employees and residents of the institutions. As reflected below, the number of responses varied as between institutions and were somewhat limited. Some general external questionnaires were also distributed to some parents of current and past young offenders, and individuals, agencies and organizations who were external resources to the institutions.

- Interviews with Fred Honsberger, Acting Executive Director, Correctional Services, and Bill Baldwin, Director, Young Offender Institutions, the psychologist and physician at Waterville, and two young offenders at their request. Representatives of the John Howard Society, the Elizabeth Fry Society, the Advisory Council on the Status of Women, an officer with the Shelburne RCMP detachment, and volunteers associated with both centres were also interviewed.

Some elaboration on the process involved for both the focus groups and questionnaires is contained in the Report.

The goal of the focus groups was to receive feedback on the participants' general views, feelings and ideas on the issue of abuse. The participants were chosen by the Superintendents of each centre, and (in the case of residents) divided into groups according to age range. The Report notes that participants in focus groups are usually chosen at random, but here the choice was left in the hands of management in the interest of saving time.

Before each session began, participants were told that their participation was totally voluntary and that no comments would be identified as having come from any particular individual. A total of 47 young offenders and 32 employees agreed to take part.

Participants were asked a series of predesigned questions. Discussion followed their responses. Participants were also shown visual material to stimulate discussion.

Appendix "A" to the Report lists the predesigned questions asked of residents. Under "definition of abuse," they were asked to provide an example of each of mental/emotional, sexual, physical and verbal abuse. Residents were told that "[a]buse is usually someone exerting power over someone else leaving the victim feeling powerless." Appendix "B" to the Report lists the predesigned questions asked of employees. They were told that abuse is "usually someone exerting power over someone else."

The Report states that every participant in the focus groups was very positive about the experience, as evidenced in the anonymous evaluations completed at the end of the sessions. There was a marked difference, however, between the focus groups at each centre. All young offenders at Shelburne were very talkative and energized, particularly the males. Discussion with female offenders was very emotional, as they talked more about their personal experiences with abuse in their lives prior to being incarcerated. The offenders at Waterville, on the other hand, were not as talkative. Their responses were described as very robotic. Of the two groups of employees at Shelburne, one was relaxed, talkative and very interested; the other was tense and almost hostile. The focus groups at Waterville were affected by the fact that they took place after the suicide of a counsellor at Shelburne who had been accused of abuse (William Belliveau). These focus groups became more of a debriefing session for staff.

The written questionnaires were "developed to capture specific information about abuse." Three different forms were used: one for young offenders, one for employees, and one for external respondents. Each employed the same definition of abuse: "Abuse can happen in many different ways. This includes sexual, physical, emotional and verbal abuse." The response rate to the questionnaires was as follows: Shelburne, 68% of young offenders (37 individuals, six of whom were female) and 25% of employees (27); Waterville, 92% of young offenders (108) and 39% of employees (52).

The questionnaires could be answered anonymously, although some respondents chose to sign their names. Some concern was expressed about confidentiality. One employee reflected that life would become unbearable if his comments became public. Another stated that line staff were unwilling to speak out of fear for their positions, suggesting that management only cared about appearances. One offender was afraid that he would be punished because staff would look at his response.

Many respondents were very positive about the process and the opportunity to provide feedback. Others, however, believed that no one cared about their views, and that the audit would become just another report on the shelf. Ms. Samuels-Stewart concluded that employees and offenders from both institutions were very reluctant or afraid to express their views. She also believed that offenders in Shelburne were not encouraged by staff to participate.

(c) The Auditor's Findings

(i) An understanding of abuse

Ms. Samuels-Stewart found that there is a clear understanding among offenders, employees and others associated with the centres of what constitutes abuse. Most respondents were satisfied with the definition given in the questionnaires. Many, however, added to the definition, citing "spiritual abuse, abuse of authority, neglect, bureaucratic abuse, psychological, spousal and cultural abuse."

(ii) Whether young offenders currently in custody are protected from abuse

Ms. Samuels-Stewart concluded that young offenders in the two centres are not protected from abuse. Comprehensive policies and procedures relating to the safety and protection of young offenders are in place but, in practice, some are not followed and others, even when purportedly followed, are not applied consistently.

She concluded from the focus groups that young offenders feel quite vulnerable to abuse. In addition, she noted that 24% of offender respondents to questionnaires from Shelburne and 18% of offender respondents from Waterville, all of whom said they were not abused, stated they did not feel safe from abuse.

Staff and others were asked about the opportunity for abuse of offenders to occur. A large percentage from both centres said that the opportunity existed. Many said that the opportunity generally existed anywhere and especially in an institution, but others gave specific examples. Some suggested that pat and strip searches are, at times, unnecessary and degrading, and that, for youth who have been sexually abused prior to being incarcerated, they might be considered abusive and compound the young person's problems in dealing with their past abuse. One professional associated with Shelburne stated that "[t]hese excessively frequent searches set up the opportunity for the possibility of actual sexual abuse, and perceived sexual abuse (particularly by those sensitized by prior abuse)." Two young offenders, who had not been abused, also referred to pat and strip searches as things they did not like.

A number of respondents, mostly employees from Waterville, reported that the night shift offers too much of an opportunity to abuse young offenders, as this was the time when staff were alone with them.[36] Many of these respondents reported that abuse is *not* occurring, but felt that the potential existed in light of the limited number of staff during the night shifts.

Ms. Samuels-Stewart concluded that offenders and employees do not report abuse. She stated:

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[36] Ms. Samuels-Stewart noted that Shelburne had the same shift schedule as Waterville.

> As can be noted in the numerical results from the questionnaires, **if abuse is occurring, nobody is talking about it.** A large percentage of offender and employee respondents did not answer the questions: ***If they were aware of or victims of abuse, did they report it?*** In addition, a large percentage indicated that they **did not report abuse**, when they were victims or aware of it. (Emphasis in the original.)

The questionnaires reflected that young offenders do not report abuse for many reasons: out of fear, because their feelings are disregarded, because staff are believed over young offenders, and because young offenders who report abuse would be "locked down."[37]

Employees indicated that they do not report abuse for similar reasons: out of fear of being fired, uncertainty as to employee rights, and concern over the effect on one's career from speaking out. Employees also listed several other reasons for not speaking out:

- A lack of training in security practices, use of force, non-violent crisis-intervention tactics and counselling;
- Poor staff morale;
- A lack of support from management. One employee wrote that "there is way too much buddy/buddy here[, m]eaning friends/relatives and one is not going to cross the other." Another wrote that "management has no idea what goes on in the unit and chooses not to." Yet another reflected that in one prominent case, a manager punched a young person in the back of the head, was charged, and was told he was losing his job, but then returned a short time later as if nothing happened.

The Report states that a large percentage of employees reported that incidents of abuse are either covered up or are not handled properly. Employees variously wrote:

- "I was told to keep quiet about it."
- "The only real incident was hushed up and management seemed to cover it up."
- "Abuse has occurred in the past with no consequences and with the present leadership will likely continue."

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[37] Distinctions are not always drawn in the Report between explanations, for example, of why abuse which occurred was not reported, and why abuse would not be reported, if it occurred. This is discussed later in this chapter.

(iii) Whether young offenders currently in custody are being abused

Ms. Samuels-Stewart found that young offenders are victims of abuse while in custody at both Waterville and Shelburne.

Male offenders in focus groups at Shelburne complained in general terms of physical, verbal, emotional and sexual abuse suffered at the hands of the staff. Emotional and verbal abuse were complained about the most. Offenders were very reluctant to talk about specific incidents of abuse, but as soon as one person began to talk about a specific incident, others followed suit.

Ms. Samuels-Stewart said "it was during these focus groups that the first allegations of sexual abuse surfaced." Allegations were made by more than one offender. Offenders spoke of an incident where a male employee needlessly entered a shower when an offender was in it. Sexual abuse was said to have taken place during pat searches. Residents maintained that not all such searches were conducted with two staff present and that some staff went too far. All offenders were uncomfortable with, or hated, such searches. Offenders understood why they were conducted, but did not understand why they had to be done so often. The Report states that "[v]ery few, if any, complained about strip searches."

Offenders stated that staff often verbally abused them. Physical abuse was described as often occurring between offenders, but also as occurring between offenders and staff.

At their request, two offenders spoke to the auditor in private. One believed that he had been abused during a pat search. The allegation was reported to the Department of Justice and became a matter of public record. The other offender said he was aware of abuse, but would provide no details.

Seven of the nine female offenders in focus groups said they had been sexually abused by persons they knew in the past. Female offenders indicated that if they were being abused they would not tell anyone. However, some specific incidents of sexual abuse came out, including staff going too far in pat searches and a female offender trading sexual favours for cigarettes with an employee. Female offenders also talked about a program which involved field trips to do manual labour. They said that some men who drove the trucks would touch them on their knees when travelling off-site. Complaints were also made of verbal and emotional abuse: name-calling, put-downs, swearing and threats.

On the questionnaires, many offenders indicated that they had been abused, but would not give details as to the type of abuse or the perpetrator. Employee and external respondents followed the same pattern. Eleven percent of employee respondents from Shelburne, and 40% of employee respondents from Waterville, said they were aware of offenders who were victims of abuse while in custody, but most did not answer the questions on the type of abuse or who the abuser was. Sixty percent of external respondents did not answer the questions of who abused whom and how. From each centre, however, most offenders, staff and external respondents said they had either not experienced abuse or were not aware of incidents of abuse.[38]

All offenders from Waterville indicated on the questionnaires that they had not experienced any sexual abuse.[39] One Waterville employee said he was aware of an offender being the victim of such abuse, but would not give details. Four offenders at Shelburne said they had experienced sexual abuse, and in every instance it was related to pat searches. One offender said "during pat searches I was sort of touched too much in a certain place. On another occasion my pants came unbuttoned." All employee respondents from Shelburne said they were not aware of any offender being sexually abused. External respondents reported not having observed or heard of any offender experiencing sexual abuse at either centre.

A small number of offender respondents reported being physically abused: seven from Waterville and three from Shelburne. Only one offender at Shelburne would give details. He said that an employee had dug a pair of keys into the back of his head, and then grabbed him by the neck and shoved him roughly back into a chair when he tried to leave. One offender from Waterville said he had seen people "thrown around, pushed, shoved."

Interestingly, more employees than offenders reported the physical abuse of offenders by staff. No reports came from Shelburne, but 31% of Waterville employees said they were aware of offenders being physically abused by staff. In fact, there were more reports from staff about physical abuse than any other type of abuse. Examples of such abuse included offenders being grabbed by the genitals (in the presence of several staff witnesses), slapped in the face, shaken "like a rag doll" and thrown against a wall. One external respondent reported being told about young offenders being physically abused by "management."

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[38] Many of these respondents said they had not been associated with the centre for very long, or had not spent a lot of time at the centre or with the offenders.

[39] One said that when he was at Shelburne he saw someone else "get felt by staff."

As was the case in focus groups, offenders overall reported experiencing more emotional and verbal abuse from staff than any other type of abuse. Twenty-six percent of offender respondents from Shelburne and 15% from Waterville indicated they had experienced emotional abuse from staff. Verbal abuse was reported by 24% of offender respondents at both institutions. Examples of such abuse included staff insulting offenders, putting them down, calling them names, and swearing and yelling at them. Offenders also reported being abused, primarily verbally, by other offenders.

Employees from both institutions, on the other hand, reported that offenders experience very little emotional or verbal abuse. One employee from Shelburne and three from Waterville said offenders experience verbal abuse from staff. One employee from Waterville reported that offenders experience emotional abuse. Employees also reported being emotionally and verbally abused by each other, particularly by management and supervisors.

One external respondent reported being aware of both verbal and emotional abuse of offenders. Another reported being aware of emotional abuse.

(d) Conclusions and Recommendations of the Report

The auditor found as follows:

- Persons held in custody at Shelburne and Waterville are not adequately protected against sexual and other abusive conduct (given the reported instances of sexual, physical, emotional and verbal abuse).

- There is not an adequate system in place to ensure that complaints can be made, received and acted upon in a timely and effective manner. Young offenders and employees often do not report abuse, and when they do, the incidents are handled internally, which (in the words of the Report) "is not seen to be adequate."

- There are not appropriate mechanisms in place to ensure proper communication and follow-up between responsible departmental authorities and police agencies in the event of allegations of sexual or other abuse of young persons held in custody. Ms. Samuels-Stewart reasoned that because incidents of abuse are either not reported or, if reported, handled internally, it follows that there is not proper communication and follow-up between responsible departmental authorities and police agencies. She also noted that the RCMP officer with whom she spoke said that, to his knowledge, his detachment had never received a complaint from the Shelburne Youth Centre.

The Report contains 23 recommendations. A number refer to the procedures regarding pat searches (how they should occur, how often, and in whose presence) and requirements for recording them. Other recommendations relate to matters such as staff training, termination of employees who physically abuse residents or who do not adhere to policies concerning verbal or emotional abuse of residents, and procedures for lodging complaints and regularly educating offenders as to these procedures. Recommendations more indirectly related to abuse were also made which need not be elaborated upon here.

The Report notes that 27% of the employees at Shelburne were related to one another either by birth or through marriage. Many people who work at Waterville were also related to each other, though percentages there were not as high. Ms. Samuels-Stewart recommended that the Department of Justice implement a policy preventing employees from being supervised by persons related to them by birth or marriage.

Ms. Samuels-Stewart recommended that her exploratory audit be followed up by another, more in-depth audit in 12 months and annual audits thereafter. In making this recommendation, she noted that many dedicated employees work at the centres, and many offenders benefit from being there. Many respondents spoke of the benefit and need for an audit such as hers to ensure positive changes. She also recommended that an external, independent body review the additional information received from the questionnaires and that the Correctional Services Division of the Department of Justice follow up on the other problems, concerns and recommendations put forward by respondents.

3. THE ACCOMPANYING LETTER

On March 17, 1995, Ms. Samuels-Stewart provided her Report and an accompanying letter to the Minister of Justice. In the letter, she summarized her Report in these terms:

> The audit reveals that young offenders are victims of abuse at both Centres. Sexual abuse, while not the main type of abuse reported, is said to have occurred primarily during pat searches. Offenders report that they suffer the most from emotional and verbal abuse from employees; on the other hand, employees report that offenders are victims of physical abuse from staff, the most. Employees, particularly from Waterville, report suffering a lot of emotional and verbal abuse from Officers-In-Charge, and management.

She also believed it important to highlight and comment on certain areas, noting that the names of staff and other similar information are not in the Report itself.

She wrote that the return rate of questionnaires from employees and offenders at Shelburne was very low, indicating that "employees just could not be bothered or many of them won't talk; and that offenders were not encouraged to participate, and/or they did not out of fear or intimidation." The return rate from Waterville for offenders was "excellent," but "not great" for employees. She strongly recommended that certain officials at Shelburne be removed from their positions, saying "[t]here is every indication that they do not have the ability or will to manage properly."

As reflected in the Report itself, she noted that participants in the focus groups were, for the most part, very eager to talk and needful of the opportunity to do so. But the process was virtually shut down by a counsellor's suicide, and focus groups held afterwards at Waterville resulted in more of a debriefing session. She stated that staff were very concerned about policies and procedures surrounding pat searches, and how to protect themselves from "allegations." They also talked a lot about inconsistencies in overall polices and procedures. She reflected that something needed to be done immediately with the Waterville employees, since "morale is very low, and they made serious allegations about the abuse of offenders by management and the cover-up of these incidents."

She noted that the questionnaires contained serious allegations against certain employees at both centres, some of whom are still working there. She reproduced some of the allegations.

Ms. Samuels-Stewart indicated that when she spoke to Bill Baldwin, Director, Young Offender Institutions, he said that many of the alleged incidents had occurred in the past and had been dealt with. He also felt that he knew who made the allegations and that this person had a hidden agenda involving a "union v. management" issue. Ms. Samuels-Stewart commented that even if that was true, these incidents were reported by more than one employee. She expressed her concerns as follows:

> My concerns are that these incidents, in the minds of employees, were covered up; and that if all of them are true, - and I believe they are -, the perpetrators are still working there. Furthermore, if they were handled internally, how?? - who outside of the institution was informed, and when - how soon after the fact?

Her audit of Waterville found "signs of serious mismanagement," but, in contrast to Shelburne, she did not make any recommendations in regards to management. She conceded that may have been because she personally liked a certain senior manager "and personality counts for a lot in my judgment of character."

Ms. Samuels-Stewart concluded by pointing out that there are very dedicated and caring employees at both centres. She added that those employees and offenders who spoke up about abuse were very brave and did so because they sincerely wanted a change.

4. GOVERNMENT RESPONSE TO AUDIT REPORT

The Minister of Justice accepted many of the Audit Report's recommendations. In particular, he indicated that:

- a review of the frequency of pat searches had already commenced, and policies and procedures regarding pat searches would be reviewed;
- all pat searches would be done in the presence of two staff members, save in exceptional or emergency circumstances;
- retraining for all staff about pat searches would be undertaken;
- employees found to physically, verbally or emotionally mistreat young offenders would be disciplined, up to and including termination of employment;
- an external agency currently involved with the provision of services to young offenders would be nominated to receive their complaints;
- the process for laying complaints would be reviewed with each young offender on a monthly basis; and
- all current employees would be screened through the provincial Child Abuse Registry.

The Minister did not adopt recommendations pertaining to the relocation of female young offenders or the building of a young offender facility in Cape Breton.

On the same date, the Department of Justice released a report by Waterville Superintendent William Lonar into an allegation of sexual abuse by former counsellor William Belliveau.[40] Based upon the available evidence, he found it impossible to determine whether the alleged abuse took place. The Department indicated that five recommendations made by the Superintendent would be implemented.[41]

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[40] Mr. Belliveau was the Shelburne counselor accused of abuse who committed suicide.

Various Government officials, including senior management and staff within the institutions, considered the Report's methodology to be seriously flawed, the findings to be inflammatory and unfair, and the anecdotal and other information to be, at times, inaccurate, misleading or incomplete. Some of these concerns are further elaborated upon later in this chapter.

5. THE OMBUDSMAN'S OFFICE

As noted above, the Government accepted Ms. Samuel-Stewart's recommendation that an external agency be nominated to receive young offender complaints. The specific recommendation was number 12, which reads as follows:

> 12. It is recommended that an external body/committee be appointed to act as a registry for complaints. In addition, an ombudsman/advocate for employees and offenders be appointed. This person or committee must be very visible at the institutions and must also be seen to be impartial.

The rationale for this recommendation was that "[e]mployees and offenders need somewhere to take their concerns."

On December 20, 1995, Fred W. Honsberger, Executive Director of Correctional Services in the Department of Justice, wrote to Douglas R. Ruck, the Province's Ombudsman. Honsberger proposed that the Ombudsman take on the function of receiving complaints made by residents as well as employees. Ruck replied on December 28th, expressing his agreement. He indicated the new task would be assigned to Linda Arthur, who would commence monthly visits to the institutions involved in January 1996. (In fact, the first visit took place in March.)

On January 22, 1996, Honsberger again wrote to Ruck, outlining the mutual understanding of the role to be played by the Ombudsman's Office. In summary, he indicated it was to:

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[41] The recommendations addressed the maintenance of complaint reports, staff training and professionalism, and existing search procedures.

- Create a visible and impartial presence in all Nova Scotia youth offenders institutions;
- Serve as a registry of complaints to provide support for staff and youth;
- Ensure a fair and consistent administration of policies and procedures by dealing with complaints and identifying related concerns to the Department of Justice;
- Ensure that staff are adequately trained in relevant areas of responsibilities by identifying training deficiencies to the Department of Justice;
- Ensure that present policies and procedures work to prevent the occurrence of abuse and identify areas of needed improvement to the Department of Justice;
- Distribute to all youth and staff an outline of the Ombudsman's role and visit with all staff within six months.

The letter noted that it would not be the Ombudsman's role to investigate allegations of abuse arising from incidents at any of the young offender institutions; these would be referred to the police or to child welfare authorities.

On March 28, 1996, the Ombudsman submitted to the Minister of Justice a document entitled *Registry for Complaints by Offenders and Employees of the Young Offender Institutions in the Province of Nova Scotia*. In an accompanying letter, Rusk stated that he was pleased to endorse the creation and implementation of a Registry of Complaints – a result of the Department of Justice's commitment to implement Recommendation 12 of the Samuels-Stewart audit. He added that this Registry would foster and promote the importance of early, appropriate and fair intervention.

The complaints subsequently received by the Ombudsman's Office from residents ranged from relatively minor matters, such as the loss of a privilege, the quality of food, and rooms being too hot or too cold, to more serious matters, such as denial of telephone or other contact with family, denial of a visit to the psychologist, and concerns with Nova Scotia Legal Aid. There were also complaints of physical, sexual and racial abuse. Complaints from employees touched on the internal investigations associated with the Compensation Program and the behaviour by residents which, according to staff, was the result of these investigations and of media attention labelling staff as child abusers. The Ombudsman also investigated concerns expressed by outside agencies such as the RCMP, the regional police and the Sheriff's office, including two complaints (one in 1999, the other in 2000) stemming from alleged improper treatment of female youth by officers and staff of a municipal police force.

On January 21, 1998, Mr. Ruck gave a report to the Minister of Community Services, noting, among other things, that "clearly, youth in care of the Province of Nova Scotia need a voice. One of the most fundamental elements of administrative fairness is the right to be heard." This lead to the establishment, in 1999, of the Children's Ombudsman, created under section 8(1) of the *Ombudsman Act*. This office now oversees all areas dealing with children. Ruck pointed out in a letter dated March 8, 2000, to the Minister of Justice, the Honourable Michael Baker, that "the presence of the Office has fostered and promoted fairness, equity, and respect." He added that, "[a]s sadly demonstrated by past events, and as declared in numerous reports and studies, there has existed in this province the need for an independent and impartial body to oversee, monitor and make recommendations with respect to services provided to children and youth."

The involvement of the Ombudsman's Office has been a positive development which followed Ms. Samuels-Stewart's recommendation outlined above.

6. INTERVIEW WITH MS. SAMUELS-STEWART

Ms. Samuels-Stewart (now Ms. Samuels) was interviewed by my senior staff. She provided helpful information, some of which was confidential and has been treated as such. Indeed, she was careful to preserve the confidences of the employees and residents with whom she had met.

Ms. Samuels-Stewart was trained as a social worker, and was a director of a women's shelter and a half-way house for adults. She then worked with the federal government on issues of employment equity, focussing on systemic discrimination issues. At one point, she was seconded to the Canadian Human Rights Commission, where she was trained as an investigator, although her work was largely in communications. She later worked at the Bank of Nova Scotia to address employment equity issues. She is now Coordinator of Race Relations and Affirmative Action with the Nova Scotia Human Rights Commission. Her experience with abused women and adolescents derived from her work at shelters.

She told us that the allotted time for her audit was very short and there was pressure not to exceed that time. She felt that this constraint prevented her from doing a complete audit. As reflected in her Report and the accompanying letter, she had deep concerns about a number of issues. She expressed some scepticism about the Government's interest in addressing those concerns.

She thought that the Superintendent at Shelburne had been largely uncooperative and uncommunicative during her audit. The Superintendent felt differently: he thought Ms. Samuels-Stewart did not make time to meet formally with the superintendents and managers of each institution, and that, had she done so, serious factual errors in her Report might have been avoided. Ms. Samuels-Stewart conceded that her experience with the officials at Shelburne was largely adversarial. As I later note, her suggestion (to the Minister) that certain officials should be terminated was, in my view, not only inconsistent with basic fairness, but well outside her mandate and, in any event, not adequately supported, if at all, by the available evidence.

Ms. Samuels-Stewart was asked whether, in hindsight, she would have done anything differently in conducting the audit. She acknowledged that her audit was not as scientific as it could have been. She recognized that she was not conducting an audit in the true sense of the word. It would have been preferable to interview management staff, child welfare authorities, parents or guardians of young offenders and former residents and staff. However, time constraints prevented this, although some questionnaires were sent to such people. She would have liked to have had someone within government to liaise with, and debrief, on an ongoing basis. She thought that the Stratton investigation and her own audit should have been merged to avoid repetitive and sensitive inquiries directed to the same issues. She recognized that she had been criticized (in her view, unfairly) for reporting an allegation of abuse which some believed contributed to a counsellor's suicide. However, she insisted she had a moral and legal obligation to report the allegation.

7. ANALYSIS

It was entirely appropriate that an audit of current policies and procedures form part of the Government's response to reports of institutional abuse. As well, it should be acknowledged that Ms. Samuels-Stewart's Audit Report contains a number of useful recommendations. However, that being said, in my opinion the Audit Report is significantly flawed, and these flaws may have contributed, albeit inadvertently, to the overall unsatisfactory nature of the Government's response.

As I earlier noted, when the Audit Report was released, its findings (as opposed to its systemic recommendations) were strongly contested by voices within Government, including the Superintendent at the Shelburne Youth Centre, Heikki Muinonen. Mr. Muinonen prepared a detailed, critical analysis of the Report which my staff and I have reviewed. However, to ensure independence and objectivity, I retained Ross Dawson to provide me with his own review of the audit.

Mr. Dawson's credentials as an internationally recognized expert in the development and provision of child abuse services are impressive. Indeed, it will be recalled that in November 1994 the Minister of Community Services retained Mr. Dawson to conduct a full operational review of the Nova Scotia Residential Centre.[42] *Since the most contentious part of Ms. Samuels-Stewart's Report had to do with her findings that young offenders were still being abused and that appropriate practices and procedures were not in place to ensure that complaints could be made and appropriately responded to, it was important that the independent review of her work be conducted by an expert properly regarded as a child's advocate. Although I do not agree with every criticism contained in Mr. Dawson's report, I adopt many of them.*

Ms. Samuels-Stewart was engaged to perform an audit into current policies and procedures. Her Terms of Reference mandated that she inquire into whether residents of Shelburne and other young offender institutions were adequately protected against sexual and other abusive conduct; whether the systems in place adequately ensured that, in the event of such improper conduct, complaints were made, received and acted upon in a timely and effective manner, and whether there were appropriate mechanisms in place to ensure proper communication and follow-up between responsible departmental authorities and the police in the event of allegations of such improper conduct. She was not mandated to investigate and determine the extent to which sexual and other abusive conduct was occurring or by whom.

> *Nonetheless, in framing her task, she identified the following as the "areas of concern:"*
>
> *1. Understanding of what constitutes abuse, by young offenders, employees, and others associated with the centres.*
>
> *2. Are young offenders currently in custody protected from abuse?*
>
> *3.* ***Are young offenders currently in custody being abused?*** *(Emphasis added.)*

A significant portion of the Audit Report is devoted to the third area of concern: whether offenders currently in custody are being abused. Much of the audit's methodology (the questions asked in focus groups, questionnaires and interviews) was directed to determining whether current offenders were being abused, the nature of that abuse and by whom it was being perpetrated.

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[42] He was also to examine the policies and procedures of the Nova Scotia Youth Training Centre, with particular emphasis on the safety and security of the residents.

The issues for the auditor were to be systemic. She was to determine whether the practices in place adequately protected against abuse, and not if it was currently occurring. She was to determine whether, in the event of abuse, practices were adequate to ensure complaints were made and acted upon and that the appropriate communications and follow-up with police could be made. Although it would be expected that answering these questions would invite some revelations as to abuse, current or historical, this did not provide a license for yet another investigation into the extent of abuse at the institutions.

Having said that, I do recognize that, arguably, if it could be shown that significant abuse was continuing to occur, it would support a finding (properly within the audit's mandate) that existing protection for residents was inadequate. But even assuming that the Terms of Reference invited such inquiries, in my opinion the investigation was flawed. Abuse was defined so broadly as to be misleading. The focus groups were told that "abuse is usually someone exerting power over someone else leaving the victim feeling powerless." Ms. Samuels-Stewart advised my review that this definition appropriately recognized the subjectivity of abuse and showed sensitivity to the needs and concerns of young people. No doubt there is much truth in those comments, but that does not mean that the definition is appropriate to every context. Here, the residents' answers were used to support a conclusion that they were currently being abused.

In the context of a closed facility for offenders, such a definition makes inevitable a determination that the residents were being abused. It would be the exception rather than the rule that a resident of a custodial setting would not feel powerless by reason of the exertion of power by another. Indeed, it is the responsibility of employees, at times, to exert such power within an institution. More important, in the context of a Government response to reports of serious sexual and physical abuse, an audit that finds abuse based upon a purely subjective, overly broad definition is likely to be misinterpreted and unfairly stigmatize the employees. It may also distract the reader from the systemic issues of concern.

Apart from these concerns, the methodology employed in the audit was deficient in a number of other respects.

The Report draws conclusions as to the absence of policies and protocols despite the existence of such policies, particularly at the Shelburne institution. Ms. Samuels-Stewart suggested, in meeting with the review staff, that the Shelburne Superintendent was the author of any deficiencies in this regard, given his failure to fully cooperate with the work of the audit. The Superintendent, on the other hand, indicated that he was never given the opportunity, which he desired, to address a number of issues, resulting in inaccuracies in the Audit Report. It is unnecessary to resolve the *competing views as to why the Superintendent's position was not available. Ms. Samuels-Stewart was acting at the direction of Government, which could have been approached to address any perceived lack of cooperation, had it existed. I emphasize the term "perceived" lack of cooperation, since I had available to me no other evidence suggesting that the Superintendent was uncooperative in dealing with Ms. Samuels-Stewart, Mr. Stratton or other Government officials on these issues.*

Mr. Dawson was of the view that the auditor should have reviewed the reporting and complaints policies and procedures for both centres and a sample of documentation such as case files and reports pertaining to the use of force, serious occurrences or complaints of abuse. Although there is little reflection of it in the Audit Report, Ms. Samuels-Stewart advised my staff that some of this documentation was indeed reviewed. She failed to more fully review it because of the lack of cooperation she perceived at Shelburne and the severe time limitations imposed by her mandate. With respect, I consider it surprising that the Report made 'findings' and recommendations absent any detailed analysis of existing policies and procedures.

Focus groups were conducted with groups of staff and residents from both centres. Focus groups can be an appropriate means of gathering certain kinds of information, depending upon the nature of the information sought, the selection of participants, the preparation of the participants for the process, and the use of a structured interview guide. Mr. Dawson notes, and I agree, that focus groups are not considered an appropriate forum for investigating whether or not participants have experienced abuse.

Ms. Samuels-Stewart told us that she prepared the participants at the commencement of the focus groups. She acknowledged that this is generally not the most appropriate time or way to prepare them for the process. She felt that Shelburne staff should have prepared them before. She also stated that the Superintendents selected participants.[43] *An auditor must assume control over the selection process and personally ensure that the participants are fully and properly prepared for the sessions. If participants are truly to be regarded as voluntary, it is insufficient to indicate to them, only after they attend for the focus group, that the process is voluntary. Their continued presence may represent reticence about getting up and leaving, rather than their free and voluntary participation in the process.*

The Audit Report reflects that the purpose of the focus groups "was to receive feedback from both young offenders and employees on their general views, feelings and ideas on the issue of abuse." Mr. Dawson suggests that this purpose did not specifically align with the Terms of

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[43] **It is the position of the Superintendents that they did not select the participants. It is unnecessary for me to determine precisely how the participants were selected.**

Reference for the audit. He also thought that the predetermined questions for the focus group were not specifically related to the Terms of Reference.

The questions for the young offender focus groups included only three questions with a somewhat narrow focus. One question related to what is abuse, one to what a person should do if abused, and one to how abuse is handled at the centre. The last question appears to presuppose the existence of abuse and, for that reason, is not appropriate. As Mr. Dawson noted, "this is especially important in group settings where contamination of information is highly possible as participants may copy or reinforce each other's perceptions and experiences both with and without a factual base." No doubt, these questions were intended to seek, in simple understandable terms, what residents had to say generally about issues of abuse. However, it would have been preferable had questions been carefully crafted to address specifically what residents view as current safeguards, their opinions of the current complaints process, and their suggestions for improving safeguards and the complaints process.

The five predetermined questions for the employee focus group were also somewhat limited and problematic. Ms. Samuels-Stewart recognized herself that the validity of conducting focus groups at Waterville after the suicide of a Shelburne counsellor following an allegation of abuse was questionable.

It is Mr. Dawson's opinion, with which I agree, that the focus group methodology was not appropriately applied and, indeed, was contra-indicated in Waterville. The reliability and validity of the information obtained through the focus groups is questionable and should not have been used to make 'findings.'

The interviews conducted by the auditor were quite limited. Mr. Dawson suggests that it would have been essential to conduct interviews with management and staff at both centres. It would also have been appropriate to interview child welfare authorities who are required to receive and investigate reports of child abuse and neglect in the regions where the centres are located, some parents or social workers assigned to provide guardianship services, and a sample of former residents and employees. Ms. Samuels-Stewart agreed that more extensive interviewing would have been an appropriate component of the audit methodology. However the time constraints imposed upon her prevented such an approach. I understand her position on this point.

The questionnaires were a central component of the audit methodology. Mr. Dawson reflected that, apart from four introductory questions, the young offender questionnaire was composed of 17 questions, 10 of which were directed to whether the resident has been abused, *details of the abuse and whether or not he or she had reported the abuse. Only three questions were directed to the resident's overall view of the centres and things he or she would like to see changed. The questionnaire would appear to have been primarily directed to the issue of whether abuse was occurring.*

Mr. Dawson also articulated the significant design difficulties in the questionnaire. These included:

- *Some questions are leading in nature and suggest abuse;*
- *Respondents self-declare that they have been abused without preparation and other means of ensuring that they understand and can apply the types of abuse which are listed in the questionnaire;*
- *The types of abuse listed are not defined or described;*
- *Some questions are overly general (such as "are you satisfied with what happened?");*
- *Some questions require a "yes" or "no" without any explanation;*
- *Many important questions related to the Terms of Reference are not asked.*

My own review of the questionnaires supports many of these concerns. For example, respondents are asked "if you have not been abused, do you feel that you are safe from being abused at the Youth Centre?" without any invitation to explain their answers. They are asked "have you ever seen anyone else at the Youth Centre suffer from abuse of any kind?" without any invitation to elaborate.

I have serious concerns as to whether any young person should be invited, through a questionnaire process, to describe their own abuse and the abuse they witnessed on others. Respondents who have experienced abuse, outside or inside the institution, are being asked for disclosures, without any support mechanisms in place either before or after these questionnaires are filled out. This is a singularly inappropriate way to invite disclosures about abuse. Where questionnaires may result in disclosures of child abuse, there are traditional mechanisms to address these concerns. These are elaborated upon below.

Despite these concerns, it is true that personal accounts or other information yielded as a result of these questionnaires could potentially enlighten the reader and advance an understanding of how the respondents are feeling. However, that is a very different matter than collating the responses and utilizing the numbers derived from them to make affirmative findings as to abuse. With respect, it would be impossible to obtain consistent and reliable information from many of the questions, given their construction and lack of definition. I agree with Mr. Dawson that the questionnaire does not lend itself to a reliable tabulation of data due to its design problems and limitations:

> *It is the reviewer's opinion that the young offender questionnaire was poorly designed, was not reflective of the terms of reference, and unlikely to yield adequate, consistent, reliable or valid data. Any audit findings resulting from aggregate questionnaire data would likely be speculative or at best very tentative.*

The questionnaire directed to employees suffers from some of the same flaws. Many questions invite speculation. Many important questions related to the Terms of Reference are not asked. Employees who may have no knowledge of abuse and have never been called upon to report abuse are invited nonetheless to express their beliefs as to whether there are young offenders who have been or are being abused (and how often), and as to whether abuse complaints are being handled properly or are being covered up. No distinction is drawn between historical and current abuse. Many of the employees had been at the institutions for years. The questionnaire does not lend itself to a reliable tabulation of data due to these design problems and limitations.

The Audit Report found that residents, employees and others associated with both centres had a clear understanding of what constitutes abuse. It was noted that most respondents to the questionnaires were satisfied with the definition given and that many added to the definition, citing spiritual abuse, abuse of authority, neglect, bureaucratic abuse, psychological, spousal and cultural abuse. In the absence of any meaningful definitions of these types of abuse or any questions directed to what the respondents understand them to consist of, it is impossible to infer that all of the respondents truly understood what constitutes abuse. On the contrary, the ways in which abuse is described or defined in the questionnaires invite misunderstanding.

The same difficulty arises in relation to the focus groups. The Audit Report noted that all offenders in the focus groups could provide examples of physical, verbal, emotional and sexual abuse. Of course, appropriate examples of abuse may well indicate some understanding of abuse. However, it does not ensure that the participants understand distinctions between abuse and inappropriate conduct. Indeed, the descriptions and definitions given invite participants to describe as abuse any exertion of power over a resident which leaves the resident feeling powerless. Abuse *is an inflammatory term which, in my view, should not be utilized to describe every inappropriate comment or action by staff that leaves a resident feeling vulnerable. As I earlier noted, this is particularly so in the context of a Government response to reports of serious sexual and physical abuse. In summary, there is insufficient support for the finding that all participants understood the meaning of abuse.*

The Audit Report found that residents in both centres are not protected from abuse. It also found that, whereas there are comprehensive policies and procedures in place, they are not all followed in practice or applied consistently. This 'finding' is made without any analysis whatsoever of what these comprehensive policies and procedures are, and in what circumstances they are not followed or applied consistently, and without any detailed analysis of how these policies and procedures could be improved. (The recommendations which later follow are very general in nature.) The cited support for this finding is that the young offenders in focus groups felt vulnerable. Also cited in support were the offenders' responses in questionnaires indicating that, although they were not abused, they did not feel safe from abuse. It is noted as well that a large percentage of respondents said that the opportunity for abuse did exist, although many said it generally existed anywhere. A few individuals are quoted as expressing concern over the frequency of degrading pat searches. Put simply, the evidence was wholly inadequate to support a finding that policies and procedures were not being followed at the institutions.

The Audit Report found that offenders and employees do not report abuse. Anecdotal comments in support of this conclusion are often speculative (e.g., "If I was abused here, we both know that it's their word against ours") or not necessarily supportive of the conclusion (e.g., "There is no support from any management positions and everyone tries to step on someone else to get ahead.")

The Report also reflected that the questionnaire results showed that "if abuse is occurring nobody is talking about it." However, a careful review of the questionnaires themselves shows, at best, that the responses from residents are difficult to interpret. At Shelburne, although 12 residents said they had experienced some form of abuse, 16 residents answered the question whether or not they had reported it. Three Shelburne employees indicated that they knew of a young offender who had been abused at the institution, but nine answered the question whether they reported the abuse they witnessed. Twenty-one Waterville employees said they knew of abuse, but only 14 indicated whether they did or did not report abuse. Forty-three percent of the residents who said they had been abused at Waterville said they did report it. Put simply, even apart from the flaws in methodology earlier identified, the data does not support the 'finding' reached. At most, it supports *the view that some 'abuse' is not reported. However, it is not helpful in correlating the type of abuse to the level of reporting.*

The Audit Report further indicated that a large percentage of employees report that incidents of abuse are either covered up or not handled properly. Some anecdotal information is provided to support this finding. The questionnaires reflect that at Shelburne three staff members felt that abuse was not handled properly and four indicated that abuse is covered up. At Waterville, 15 staff felt that abuse was not handled properly and the same number felt it was covered up. Presumably, the close correlation between the numbers of respondents reflects that the same staff members are answering both questions. However, 10 staff in total reported that they witnessed and reported abuse to management, counsellors or to the authorities, and only five indicated that they were aware of the outcome. Mr. Dawson concluded as follows:

> *While only 5 staff members indicated they were aware of the outcome of the report of abuse many more staff responded to the questions of appropriate handling of reports and cover up. This would suggest that staff responses to these questions are opinions or biases and not based on direct knowledge ... The reliability of the data regarding the handling of abuse reports and possible cover up is very questionable. This combined with the problems identified related to the questionnaire itself suggest that no valid finding should be made respecting these matters.*

I agree.

The Audit Report found that offenders currently in custody in both centres were being abused. The anecdotal information from the focus groups contained few examples of clearly abusive behaviour. There appears to be an assumption that pat searches should be characterized as abusive if subjectively regarded as such by the offenders. As well, the Audit Report noted that offenders were reluctant or afraid to talk about specific incidents of abuse, but followed suit once one offender disclosed. It is difficult to determine if the reliability of these disclosures was compromised by group dynamics. Given the flawed methodology earlier described, it is difficult to place reliance upon the questionnaires to conclude that abuse was occurring at the institution to a significant degree. However, the responses, together with some anecdotal information, certainly invited concern that some improper behaviour by staff occurred, the nature and quantity of which was uncertain. That could properly be the subject of recommendations. Mr. Dawson concluded as follows:

> *In the reviewer's opinion there are too many problems associated with the questionnaire methodology and the interpretation of the resultant data to conclude with certainty that residents in both centres are currently being abused. At best, the results indicate that there is a strong possibility that some abusive behaviour is taking place, and that the differential*

> *in staff reported knowledge of abusive knowledge suggests that response of one staff group is highly suspect in terms of its accuracy.*

Mr. Dawson also took issue with the contents of Ms. Samuels-Stewart's letter to the Minister of Justice which accompanied the Audit Report. He regarded, as do I, her recommendation to remove two senior officials from their positions at Shelburne to be inappropriate. Her conclusion that there are signs of serious mismanagement at Waterville was equally inappropriate: the issue of performance appraisal was not included in the audit's Terms of Reference, nor was the audit methodology designed to evaluate management's performance. But in any event, management's performance is not even discussed in the Audit Report. No foundation or justification for the auditor's recommendations or conclusions is contained in it. Her comments appear to indict public officials without evidence or administrative fairness, and appear to be highly subjective and personal. Indeed, Ms. Samuels-Stewart acknowledges, somewhat surprisingly, that the fact that she personally likes a senior manager at Waterville may explain why she did not make a recommendation regarding his continued employment.

As earlier noted, Ms. Samuels-Stewart reflected that the return rate of questionnaires from employees and offenders was very low, indicating to her that "employees just could not be bothered or many of them won't talk; and that offenders were not encouraged to participate, and/or they did not out of fear or intimidation." Mr. Dawson concluded, as do I, that these comments are highly judgmental and pejorative and do not appear to be based on objective data and findings. Unfortunately, this letter undermines the credibility of the Audit Report.

Questions were raised during the review concerning Ms. Samuels-Stewart's qualifications to conduct the audit. Ms. Samuels-Stewart is an extremely capable individual with experience in human rights and systemic discrimination issues. She was a director of a half-way house for adults, had training in the investigation of complaints with the Canadian Human Rights Commission, and had experience as a liaison officer for the John Howard Society. Her work history for the five years prior to her audit was primarily related to human resources work.

In my view, fulfilment of this mandate required 1. knowledge and experience regarding child abuse, its causative and contributing factors, and factors which contribute to abuse in residential care settings; 2. knowledge of and experience in techniques for interviewing potentially abused young people in a way that enhances reliability and minimizes the possibility of contamination; 3. familiarity with the governing legislation; 4. knowledge and expertise relating to best practices in residential care, with an emphasis on young offender institutions, and policies and procedures, staffing, training and supervision existing elsewhere that prevents abuse or protects youth in residential care settings; 5. knowledge of and expertise in audit methodologies, data collection *techniques to ensure validity and reliability, and the analysis of data; 6. knowledge of existing protocols relating to communication between police, social agencies and young offender institutions; and 7. knowledge of existing complaint processes relating to young persons in residential settings.*

Ms. Samuels-Stewart had no prior experience in conducting research or evaluations of young offender institutions, or in designing or conducting institutional audits. She had little or no specialized training in child abuse, existing policies and protocols designed to address the potential for abuse in residential settings, and the complaint or investigative processes relating to young people. She appeared to have little or no prior knowledge of the protocols between police agencies, child welfare agencies and young offender institutions. None of this is intended to involve any criticism of Ms. Samuels-Stewart, but rather is a recognition that there were significant deficiencies in her knowledge and experience that inhibited an ideal fulfilment of the audit's mandate.

I earlier made reference to the analysis of the Audit Report prepared by Mr. Muinonen, then Superintendent at Shelburne. It was obvious from interviews conducted during my review with Mr. Muinonen and Ms. Samuels-Stewart, as well as from their writings, that they held very different perspectives on the auditor's approach to her task. Mr. Muinonen identified numerous factual errors in the Audit Report which, in his view, were attributable to the auditor's failure to formally meet with him and others, despite requests to do so. Ms. Samuels-Stewart perceived Mr. Muinonen to be uncooperative and reluctant to assist her. As I said before, it is unnecessary for me to resolve the conflicting views on why the auditor did not obtain full explanations from the Superintendent and others about existing practices and procedures. With respect, it was the auditor's duty to ensure that senior management's perspective was fully articulated, even if, as I also noted before, their participation was compelled through the intervention of the Department of Justice. It is also unnecessary for me to address each of the alleged factual errors contained in the Audit Report. However, existing documentation does permit me to conclude, apart from the flaws in methodology and 'findings' earlier identified, that the Report contains some significant factual errors and omissions. It is only necessary to refer to some by way of illustration.

The Audit Report leaves the impression that serious allegations of abuse were only handled internally, usually in an unsatisfactory manner, and that these allegations may have been covered up or otherwise improperly dealt with. There is little or no reflection that the RCMP or the Children's Aid Society ("CAS") was advised of abuse complaints.

Mr. Muinonen suggests that this is seriously misleading. Procedures for reporting child abuse go back to at least 1991 and were accompanied by significant training by child abuse specialists and by a reporting form developed in consultation with the Shelburne County CAS.

Children's Aid Society and Shelburne records reflect that the CAS office at Barrington was contacted respecting abuse allegations on at least 12 occasions prior to the audit. Shelburne has been criticized in the past by the Children's Aid Society of Shelburne and the Shelburne RCMP detachment for over reporting possible abuse cases.[44] *This matter was the subject of discussion between senior RCMP officials in Halifax, representatives from detachments at Barrington and Shelburne, and senior administrative staff with the Department of Community Services.*

It is not my role here to now assess the adequacy of policies and procedures to address complaints of abuse in place during the audit. However, I have reviewed independent documentation that does support some of Mr. Muinonen's contentions and which would have been available during the audit. Ms. Samuels-Stewart did not interview CAS employees. Her Report reflects that **one** *RCMP officer said that, to his knowledge, they had never received a complaint from the Shelburne Youth Centre. With respect, Ms. Samuels-Stewart's limited review of existing practices and limited interviews with senior management, the RCMP and Children's Aid did not permit her to indict the two young offender institutions for a failure to follow policies and procedures.*

The Audit Report details some serious allegations of abuse. Mr. Muinonen indicated that he was aware of most, if not all, of these allegations. For example, the Report refers to a serious allegation of trading cigarettes for sexual favours. Mr. Muinonen indicated that this matter was referred to the Shelburne detachment of the RCMP for investigation. They found no basis for the allegation. Reference is made to two residents who spoke to the auditor privately. As the auditor noted, one of the allegations was known to the RCMP and later became public after the employee committed suicide. Mr. Muinonen has indicated that the other was reported (prior to the auditor's encounter) to the CAS. That resident chose not to press charges with the RCMP. An incident involving the abusive use of keys was reported to the RCMP and to the Children's Aid Society. An anecdotal reference to a punching in the head was noted without reference to the disciplinary action that followed. No reference was made to the termination of two casual staff members for inappropriate use of force. As well, Mr. Muinonen noted that some of the anecdotal information related to historical matters, but were not identified as such in the Report. In his view, institutional memories are long-lasting. Therefore, some precision is required to extract meaningful information.

Again, it is not my role here to evaluate the appropriateness of the institution's response to allegations of abuse. Nor is it necessary to independently evaluate Mr. Muinonen's assertions. If the auditor felt compelled to devote her attention, in large measure, to specific allegations of abuse,

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[44] *The RCMP has a protocol through which complaints made to the Children's Aid Society are also routed to them.*

she had some obligation to investigate how the institutions responded to those allegations. It is clear that undue emphasis is placed by the auditor on anecdotal information, speculation and impressions of respondents. Unfortunately, despite the best intentions, the Report does not represent a balanced and informed evaluation.

Mr. Muinonen articulated safeguards which existed to address abuse that were not recognized by the auditor. For example, offenders were informed during orientation of their recourse if abused. They signed forms acknowledging they had received this information. Additional information was provided following placement in the unit. Recourse for young offenders was posted in all units, and telephone numbers for the Children's Aid Society, the RCMP and the Superintendent were provided. The offenders were aware of access to the chaplain and a psychologist, and had unlimited access to lawyers, if requested. They each had youth workers assigned to them. Request boxes were provided throughout the institution. The Superintendent had an open door policy.

Again, I am unable now to evaluate the existence or adequacy of these safeguards. But these were issues which Ms. Samuels-Stewart should have specifically addressed.

Two additional problems with the questionnaires were noted by Mr. Muinonen. First, reliance is placed upon the respondents' views as to whether appropriate action was taken in response to complaints. He noted that some employees do not have complete information and are not always aware of the actions of management respecting individual employees. They will often not know the results of the investigation. Hence, they frequently make assumptions based upon limited knowledge. Second, the methodology was so imprecise that a number of respondents expressing awareness of abuse may all have been referring to a single incident, rather than a series of incidents. The distinction is, to state the obvious, of importance. I agree with much of what Mr. Muinonen has said in this regard.

It is unnecessary to further elaborate upon Mr. Muinonen's concerns. A number are well founded and conform to Mr. Dawson's independent evaluation of the Report.

In summary, it is my view that:

- *The definition or description of abuse contained in the Audit Report was unhelpful in ensuring an accurate appreciation of the issues. In the context of a custodial setting, and in the context of the Government's response to serious allegations of physical and sexual abuse, the definition was potentially misleading.*

- *The audit's Terms of Reference were not fulfilled. The existing policies, procedures, systems and mechanisms in place to ensure that complaints of abuse are made, received and acted upon appropriately and to ensure proper communication and follow-up between departmental authorities and police agencies, were inadequately audited and were not specifically addressed. Undue focus was placed on trying to investigate the nature and extent of abuse within the institutions, matters outside the Terms of Reference.*

- *The methodology used to fulfill the mandate was significantly flawed.*

- *As a result, the conclusions were not always supported by the evidence.*

- *Available evidence which could have qualified or altered those conclusions was not obtained by the auditor. Ultimately, the auditor bears the responsibility of ensuring that she has accessed the relevant evidence. She did not do so, although I recognize the time constraints placed upon her.*

- *The audit was not truly an audit. Instead, it was a collection of anecdotes and information, sometimes speculative or secured through processes that did not enhance the ultimate reliability or accuracy of the information.*

- *Many of the Audit Report's recommendations were not dependent upon the flawed findings and methodology and were deserving of consideration. However, a proper methodology and approach would have permitted detailed, precise recommendations directed to modifying existing policies, procedures and practices.*

In fairness to Ms. Samuels-Stewart, I must point out that many of the participants in focus groups spoke positively about her approach and found the sessions beneficial. Some of the responses to questionnaires and information communicated in focus groups invited concern and deserved follow-up and investigation. Further, Ms. Samuels-Stewart did recognize that the Report was to be regarded as exploratory and an initial evaluation only. She recommended that it be followed by a more in-depth audit in 12 months and annual audits thereafter. She also recommended that an external, independent body review the additional information received from the questionnaires and that the Correctional Services Division of the Department of Justice follow up on the other problems, concerns and recommendations put forward by respondents.

The point here is not that no abuse was occurring at the institutions or that no improvements were warranted. It is, rather, that Ms. Samuels-Stewart's conclusions were inconsistent with an exploratory audit and detracted from the important systemic work she was engaged to perform. Further, her Audit Report was likely taken as confirmation by some that serious, widespread systemic abuse had occurred at the institutions. This likely contributed, as we know the Stratton Report did, to a failure by the Government to ensure that allegations of abuse were appropriately validated before compensation was paid out.

V

The Stratton Report

1. INTRODUCTION

On December 1, 1994, the former Chief Justice of New Brunswick, The Honourable Stuart G. Stratton, Q.C., was appointed by the Nova Scotia Minister of Justice to lead an investigation into incidents and allegations of sexual and other physical abuse at five provincial institutions: the former Shelburne School for Boys (now the Shelburne Youth Training Centre), the former Nova Scotia School for Girls (now the Nova Scotia Residential Centre), the Nova Scotia Youth Training Centre at Bible Hill, and the Children's Training Centres at Sydney and Dartmouth. He was later asked to expand his investigation to include an examination of how the Ministry of Community Services handled reports that a former employee, Cesar Lalo, had sexually abused children under his care.

Mr. Stratton's Terms of Reference were as follows:

1. Investigate the incidents of sexual and other physical abuse of residents that occurred or are alleged to have occurred at the institutions;
2. Investigate and determine the practices and procedures in place at the institutions that either permitted or hindered the detection of abuse of residents;
3. Investigate and determine whether any employees of the institutions or any public officials were aware of abusive behaviour of staff towards residents; and
4. Investigate and determine what steps, if any, were taken by employees and officials in reference to any such abuse.

The primary focus of the investigation was to be on the years from about 1956 to the mid-1970s (without, however, being restricted to that time frame). In order to avoid re-victimizing the victims, the investigation was not to take place in a public forum and the identities of the victims were to be protected as much as possible. Mr. Stratton was to report his findings to the Minister of Justice by June 30, 1995.

In the end, the Stratton investigation received reports of sexual and/or physical abuse of 89 individuals who, as children, were under the care of the Province in one form or another. Mr. Stratton came to specific and varying conclusions regarding many of the complaints, but on the whole he believed them to be generally reliable and accurate. However, he acknowledged some limitations of the process which he undertook: the statements taken by the investigation were not sworn or tested by cross-examination; they described events from the distant past based on memories which could have been coloured by the self-interest of those who complained as well as those against whom complaints were made; and some complainants admitted they were looking for financial compensation for what they had experienced. The investigation located very little written material that would have assisted in confirming the truth of what was alleged, either by the complainants or by the alleged perpetrators.

At the end of his Report, Mr. Stratton had this to say:

> Having pondered the overall results of the present investigation, I would express the opinion that a public inquiry is not required in the present instance. I believe that we have gathered sufficient information for the Minister of Justice to be able to proceed with the next and final step of the process. I also believe that the picture that emerged from our investigation, although not a pleasant one, is nonetheless, fairly accurate ... I conclude ... that there is a high moral obligation on the Province of Nova Scotia to address the present plight of the complainants.

My description and subsequent analysis of the investigation and its conclusions are based on a detailed review of all of the records of the investigation submitted by Mr. Stratton to the Department of Justice (sometimes referred to as the "Stratton Boxes"), interviews with Mr. Stratton, his investigators and, in some cases, the individuals with whom they spoke and, of course, Mr. Stratton's Report, dated June 30, 1995.

2. CONDUCT OF THE INVESTIGATION

Mr. Stratton began his work on December 2, 1994. He engaged Harry E. Murphy, President of Facts-Probe Inc., and his son, Duane P. Murphy (collectively "the Murphys"), as investigators. Harry E. Murphy had been an RCMP officer for 33 years. He retired in 1989 with the rank of Superintendent. He had been involved in various kinds of investigative work. Following retirement, he was engaged as an investigator by private industry and Government, most notably as one of the lead investigators in the Department of Labour investigation of the Westray Mine explosion. He was well qualified to carry out and oversee complex investigations. Duane Murphy did not have prior investigative experience. However, most statements were taken in the presence of both Murphys.

Mr. Stratton placed advertisements in newspapers calling upon former residents of the five institutions who had been subjected to sexual or other physical abuse to come forward and meet with the investigators on a confidential basis. Advertisements were placed in *The Chronicle-Herald/Mail Star*, *The Cape Breton Post*, *The Daily News*, *The Truro Daily News*, and the *Shelburne Coast Guard*. A press release, in identical terms, was also sent to all major media outlets in Nova Scotia, which were requested to broadcast the release as a public service announcement. A copy of the advertisement is reproduced in Appendix "D".

Mr. Stratton and his team visited each of the five residential institutions under review. They also examined files from the Ministries of Justice and Community Services, as well as police files concerning previous related investigations.

In his Report, Mr. Stratton described his approach to interviewing complainants as follows:

> In planning on how I could best accomplish the task of investigation assigned to me, I decided that we would first concentrate our efforts on obtaining statements from the victims who came forward. I also decided that the least intimidating approach would be to have the victims tell us something of their personal history and describe in as much detail as possible their experiences at the residential institutions under investigation. Their statements were then written out in long hand, read back to them, signed and witnessed.

Our interview with the Murphys confirmed Mr. Stratton's directions that they were not to take an adversarial approach, but to simply take statements from those who came forward to tell of abuse. Those interviewed were not asked to have their statements tape recorded – statements were taken the old-fashioned way, by long hand. Those who claimed abuse were told that their statements would be kept confidential. Areas canvassed included the length of the individual's stay at the institution, why he or she had been resident there, the type of abuse suffered, the names of the alleged abusers, and whether there were witnesses to the incidents of abuse. Individuals were also asked whether or not they had complained of abuse, to whom they had complained, and what had happened to their complaints, if anything.

The information given in the interviews was written down as close to verbatim as possible. The Murphys told us that, without fail, statements were then read back and the person interviewed was asked to confirm that it was correct.[45] The Murphys acknowledged that early on in the process some leading questions may have been asked, but said that this practice decreased over time.

As stated before, Mr. Stratton was directed to avoid re-victimizing the victims. To carry out this direction, he set up a "Victim Abuse Log." This document contained the names and contact information of all alleged victims, as well as details on how they came to approach the investigation or how they were known to the investigators from other sources (such as court documents, RCMP investigations, or having been named by others as victims of abuse). A code was given to each alleged victim. In addition, codes were assigned to staff members and former staff who were interviewed or who were named by those giving information to the Stratton investigation. This system was used for each of the five institutions that were the subject of the investigation.

Statements were taken from a number of past and present officials of the Ministries of Justice and Community Services, and from past and present employees of the five residential institutions. Assurances were given by Mr. Stratton that if current staff members were named by former residents as having committed physical or sexual abuse, they would be approached in order to hear their side of the story. In the end, however, statements were not obtained from all the individuals who were the subject of complaints. Many of them had died or could not be located.[46] Some were simply not contacted.

Mr. Stratton advised employees that their statements would be kept confidential, unless the matter ended up as a public inquiry. In early December, the Minister instructed his Deputy to direct Ministry employees to cooperate fully with the investigation. David Peters, president of the Nova Scotia Government Employees Union ("NSGEU"), wrote to Mr. Stratton on December 29, 1994, raising concerns that due process be provided to its members. He submitted that the most appropriate way to investigate the matters within Mr. Stratton's mandate was by way of a public inquiry, which would safeguard the individual's right to silence and protection from self-incrimination. He indicated he would be advising the union members that, absent assurances of immunity from criminal prosecution or disciplinary action, they should refuse to be interviewed unless they were provided with independent legal counsel. Mr. Stratton was unable to provide immunity or independent counsel. The Minister of Justice wrote to Peters on January 12, 1995. He stated that he was only asking for voluntary participation by staff, and that no one would face disciplinary action for choosing not to be interviewed. In the end, no current employees declined to be interviewed. One former employee refused to provide a statement.[47]

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[45] Some persons read over their statement themselves.

[46] One former employee was not available to be interviewed due to "senility."

The interviews of former and current employees, in particular at Shelburne, sought the following information: 1. their length of service and position at the institution; 2. their duties, education and training prior to and at the institution; 3. whether or not there were written or other policies regarding the use of force, and the reporting of either physical or sexual abuse; 4. whether any incidents of abuse had been observed, who the abusers and victims were, whether the abuse was reported and, if so, what occurred as a result; and 5. what knowledge, if any, they had about Patrick MacDougall's sexual abuse of residents.

If an allegation had been made that the employee had committed abuse, the Murphys protected the confidentiality of the complainant. Sometimes they provided information as to the general type or manner of abuse, but no names, dates, or other identifying information were provided.

Employees generally provided taped statements, although some former employees provided handwritten statements instead. Two declined to sign their written statements. Another discussed his knowledge freely but did not wish to provide a formal statement.

Almost all the statements from former and current employees were taken by the Murphys alone. However, Mr. Stratton did participate in a lengthy taped interview with former Superintendent Barry Costello on May 3, 1995. He also personally interviewed managerial staff from the Sydney Children's Training Centre as to the circumstances surrounding MacDougall's transfer to that institution, his conduct while there and the safeguards taken to avoid contact with residents.

It is clear from our discussions with Mr. Stratton and the Murphys that, in their opinion, it was not necessary for Mr. Stratton to be involved in interviewing either those who claimed abuse or those who, although accused of abuse, denied it. Mr. Stratton did not see it as his role to resolve issues of credibility. In relation to the Shelburne School for Boys, there are no indications of credibility assessments being made by the Murphys during their interviews of either those who claimed abuse or those who denied it. During their investigation into allegations of abuse at the Nova Scotia School for Girls in Truro, however, the Murphys made specific notations that they believed the seven individuals claiming to have been abused by George Moss. Mr. Stratton also made a note during the one interview of a former resident that he attended (of F.V.Y. on February 21, 1995) that he considered the complainant to be truthful.

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[47] One other former employee who had no known allegations against him declined to be interviewed, citing health reasons (two recent strokes), but offered to be interviewed if there was an overwhelming requirement for it.

In terms of chronology, statements were taken throughout the investigation, the earliest on December 14, 1994, the last on June 21, 1995. The interviews of former and current employees occurred generally in May and June 1995, although two were held in February, three in March and four in April 1995.

At the conclusion of the investigation, eight boxes – the 'Stratton boxes' – were sent to Linda Sawler, Chief Clerk for the Central Registry, Department of Justice. An inventory of the materials was sent to Alison Scott, a lawyer in the Department of Justice, who was designated as the 'custodian' of the Stratton materials.

3. SHELBURNE SCHOOL FOR BOYS

The former Shelburne School for Boys ("Shelburne") was the focus of much of Mr. Stratton's investigation. Patrick MacDougall, a former counsellor, had already been convicted of 11 counts of sexual misconduct in relation to several former residents, some of whom had commenced lawsuits against the Province.

Shelburne was a government-run institution set up to house boys committed to provincial care under the *Juvenile Delinquents Act*. Residents ranged in age from seven to 16 years, but the majority were teenagers. The nature of the offences for which they were committed varied from theft and related crimes to truancy and unmanageability. However, as Mr. Stratton noted, over the years Shelburne was also used by the province to house children for whom no other home could be found.

A total of 69 former residents of the school provided statements to the Stratton investigation, detailing 205 incidents of physical abuse and 103 incidents of sexual abuse. The nature of reported abuse was occasionally minor, but often more severe. Allegations were made of punching, kicking, striking, fondling, forced masturbation, and oral and anal sex (among other things). Former residents complained that they suffered short- and long-term physical injuries, as well as lasting emotional and psychological scars, which often led them into future conflict with the law and alcohol and drug abuse. Some stated that when they complained about their mistreatment, they were accused of lying, beaten further, and sometimes thrown into forced isolation for extended periods of time. A number of the former residents not only reported incidents of abuse against themselves, but also said they witnessed the perpetration or aftermath of abuse on others.

A total of 19 counsellors were named as sexual abusers. Two were named by more than one complainant. By far the largest number of complainants alleged that they had been physically abused by counsellors.

As a result of his investigation, Mr. Stratton concluded that sexual and physical abuse had taken place at the school. He did not specifically find how many of the 308 reported incidents occurred, but commented that, "leaving aside some exaggeration, ... my investigators were satisfied that in all cases, save perhaps three, the complainants were attempting to recall from their memories and truthfully report events and circumstances that had occurred some 20-40 years ago."[48] The investigators believed that one of the complainants may have embellished his story somewhat, another did not display the usual indications of trauma, and a third gave his statement in a highly emotional state and was, perhaps, for that reason unable to name any of his abusers.

In respect of physical abuse, Mr. Stratton found that it could be "safely concluded" that counsellors resorted to physical force to control residents, and that they had received direction from their superiors to do so. It was not until 1978 that there was an express prohibition against the use of physical force. Mr. Stratton concluded that the use of physical force was an accepted method of maintaining discipline and, as a result, it was sometimes "open season" on the boys at Shelburne.

Mr. Stratton further concluded that staff at the school and officials in the Department of Community and Social Services had been aware that abuse was taking place, but took no positive steps to end it at least until the mid-1970s. Several former residents said they believed that senior staff at the school had been aware of the abuse and either did nothing or sought to cover it up. As noted above, some also said they complained about the abuse to the staff.

Some residents acknowledged that they never reported the abuse. Mr. Stratton found that it was not difficult to understand why so few of the residents complained. The boys were committed to Shelburne for indefinite terms, the length of which depended on how their conduct at the school was perceived by the staff. The residents were cut off from family and home. They were subject to peer pressure to conform and not be a "rat." The more experienced boys also understood that complaints were seldom believed.[49]

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[48] All quotations, unless otherwise noted, are taken from the Stratton Report.

Mr. Stratton attributed partial responsibility for the problems at the school to "a serious lack of funding." This lack of funding led to four inadequacies. First, salaries were too low to attract professionally trained employees, and only insignificant resources were allocated to on-the-job training. As a result, residents were often supervised by inadequately trained staff who had sometimes been "hired off the street" possessing only a high school education. Second, the staff-to-resident ratio was historically too high. In the 1970s, in fact, a study concluded that the school was the poorest staffed facility in the country. Third, for most of the period under review there were no written protocols or guidelines regarding the use of physical force and physical punishment. He also concluded that it was not until 1970 that the use of force, except in self-defence or defence of another, was prohibited. There were also no established practices and procedures for the reporting of physical and sexual abuse. Fourth, the physical design of the facility was inadequate. The school was initially housed in two refurbished Second World War Navy barracks, and it was only in the late 1960s that construction began on new permanent quarters.[50]

Mr. Stratton also found that the communal living arrangements offered by the dormitory facilities of the barracks were unsuitable for a school housing children who often suffered from significant behavioural disorders. He also noted that the town of Shelburne was not centrally located so as to be easily accessible from all parts of the province. This created problems for visits by parents of the residents, communications with department officials in Halifax, and transporting residents to and from the school.

Our examination of the available records shows that 58 former residents were interviewed by the Murphys. Mr. Stratton attended one of these interviews. Eleven others supplied information either by way of letter or by statements submitted by their litigation lawyers. Nine of the 69 individuals referred to by Mr. Stratton as claiming physical and/or sexual abuse were complainants in the criminal process involving Patrick MacDougall.[51] In other words, there were 60 additional individuals who came forward claiming abuse by MacDougall or other former or current staff.

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[49] Mr. Stratton noted that it was not surprising that complaints were seldom believed, given that many staff members were related by blood or marriage.

[50] The last of this construction was completed in 1979.

[51] Patrick MacDougall's convictions related to 10 complainants. Only one of them was not identified in the Stratton investigation as an individual who had been abused while a resident at Shelburne. This individual did not come forward to the Stratton investigators, but did ultimately make a claim in the compensation program.

All 69 former residents who claimed to have been subject to physical and/or sexual abuse were included in Mr. Stratton's Report. Yet the coding system employed in the investigation demonstrates that there were far more than 69 individuals who were either spoken to or available to be interviewed. An examination of the Victim Abuse Log demonstrates that there were 193 names entered.

Forty-nine of the 193 persons listed in the Log denied being a victim of, or witness to, any physical or sexual abuse.[52] As reflected in the investigators' notes, some of these individuals indicated they had received very good care and that their stay in the institution was a positive experience. In addition, there are 60 additional names of individuals listed as potential further victims of Patrick MacDougall, but they do not appear to have been contacted. Of the sixty, 35 went on to be claimants in the Compensation Program. Of the 49 who denied being the victim of any physical or sexual abuse, 24 went on to be claimants in the Program.

Harry Murphy also prepared a summary for Mr. Stratton of statements made by 84 former residents of Shelburne who had been contacted by the RCMP. Many denied any knowledge of sexual abuse, being a victim, or having witnessed sexual or physical abuse of any nature.

There is no record in the materials of any attempt by the Murphys to compare the statements given to the investigation by persons claiming to be abused with their prior statements to the RCMP. They did not attempt to obtain medical records from the Roseway Hospital in Shelburne. They did not carry out any examination as to whether or not the employees who were named as being abusers were present at the institution at the same time as the persons claiming to have been abused.[53] They did not search for institutional records pertaining to residents alleging abuse or obtain employment records of employees named as perpetrators.

In our discussions with the Murphys, they acknowledged that these are steps that would ordinarily be undertaken in an investigation. However, they did not have the time to do so. The Murphys viewed their goal to be the gathering of sufficient information to make a sound assessment of whether or not sexual and physical abuse had gone on at the institutions. They believed this had been accomplished.

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[52] Some claimed to have witnessed an assault by MacDougall in 1975. Information pertaining to these 49 individuals was usually gathered, not from direct interviews, but from secondary sources such as RCMP reports.

[53] As it turned out, three individuals who claimed to have been physically and sexually abused by Patrick MacDougall were not at Shelburne when he was an employee.

The records available to us show that 26 former and seven current employees of Shelburne were interviewed by the Stratton team, including the Superintendent and Assistant Superintendent (neither of whom were the subject of any allegations of misconduct). There is no record of any attempt to contact 10 former employees who were named as having committed some act of physical or sexual abuse.

Many employees expressed their view that sexual and physical abuse was not tolerated by any of the staff and that there was a 'no physical force' policy in place. They were indignant at the suggestion that counsellors would back each other up or would turn a blind eye to physical or sexual abuse. A number indicated that they had reported the use of inappropriate force by other counsellors. Former Superintendents recounted examples of staff being disciplined or fired over their use of force. One stated that it became known that a counsellor who struck a child was subject to dismissal.

Some employees admitted to slapping some of the boys with an open hand, grabbing residents by the arm or scruff of the neck to compel obedience, or to other acts which Mr. Stratton concluded would be considered abusive by modern standards. One staff member, George Allen Guye (also known as Mickey), expressed the view that physical abuse of residents was an accepted way of life at Shelburne during the 1960s, and that boys would be hit if a counsellor lost his temper or honestly believed that force could properly be used. He stated that new counsellors were told by older ones to hit residents in order to keep control, and that staff members would falsify reports on the use of force. He added that things began to change for the better when Barry Costello arrived as Superintendent in 1970.

4. SYDNEY CHILDREN'S TRAINING CENTRE

The Sydney Children's Training Centre was established in 1969 to provide care for severely mentally challenged children from Cape Breton Island. It also provided medical and nursing care and supervision.

The Stratton investigation did not receive any complaints of abuse in connection with this facility. On the contrary, the individuals who spoke to the investigation described the centre and its employees as first rate. The centre was also of interest to the investigation because it is where Patrick MacDougall was transferred after he was dismissed from his duties at the Shelburne School for Boys in 1975.

MacDougall was dismissed from Shelburne after he was confronted with an allegation that he had sexually abused one of the residents, an allegation which he did not deny. The Superintendent of Shelburne purported to fire MacDougall, but officials in the Ministry of Community Services (then the Department of Social Services) transferred him to the Sydney Children's Training Centre instead to work as a night watchman. Mr. Stratton concluded that the transfer had to have been approved by the Minister of Social Services, and that it occurred as a result of concerns that MacDougall might commit suicide if discharged. The investigation was told that MacDougall's wife had written a letter alleging that MacDougall would take his own life if he lost his job.

The Superintendent of the Sydney centre was specifically directed to ensure that MacDougall was kept away from the children. However, neither he nor his assistant was advised of the reasons why, beyond the fact that MacDougall had had some problems with the children at Shelburne.

Mr. Stratton noted that MacDougall proved to be a satisfactory employee at the centre. No complaints were registered against him, and he received a favourable work performance report. Nonetheless, Mr. Stratton concluded that MacDougall's transfer to the centre appeared to be inexplicable.

5. NOVA SCOTIA SCHOOL FOR GIRLS

The Nova Scotia School for Girls was originally established by the major Protestant churches of the Maritimes as a home and training school for homeless girls. It was taken over by the Department of Public Welfare (now the Department of Community Services) in 1967, and offered care for girls from Nova Scotia, New Brunswick and Prince Edward Island.

As Mr. Stratton noted in his Report, girls were only admitted to the School if they had been found guilty of an offence under the *Juvenile Delinquents Act* or were committed to the School under the *Child Welfare Act*. A large number of the girls were committed for truancy. Others were committed for unmanageability or for having committed theft-related offences.

A riot occurred at the school in 1975. Management subsequently hired male counsellors for the first time to assist the female staff. Four men were hired, including a person named George Moss.

A total of nine former residents came forward and gave statements alleging that they suffered sexual and physical abuse at the school.[54] A tenth former resident communicated her allegations in writing. A former counsellor also came forward and alleged that she had witnessed and reported incidents of physical and sexual abuse at the school.[55] The Murphys reviewed the investigation Another former counsellor, however, indicated that in her long term at the school she never saw nor heard of counsellors using unnecessary or excessive force on the residents.

Most of the allegations related to activities by George Moss, although four other staff members were also implicated. Among other things, Moss was reported to have repeatedly kissed, hugged, fondled and digitally penetrated residents, once even going so far as to attempt forced intercourse. Other staff members were accused of physical and sexual abuse. Many of the former residents stated that they suffered long-term harm as a result. Some attempted suicide, abused alcohol and drugs, and had difficulties trusting others. They also often ended up in abusive relationships.

Mr. Stratton made no explicit finding as to whether the reported abuse had actually occurred, but he did note at one point that "we found no reason to doubt what [the complainants] told us." As noted in Chapter III, George Moss was charged in 1992 with having sexually abused former residents. He ultimately pleaded guilty to four counts of indecent assault. Another former counsellor, Douglas Hollett, was convicted by a jury in 1992 of having had sexual intercourse with a former resident. He was sued by that resident in 1993. The Stratton team did not interview her.

Some of the former residents told the investigators that they had reported the abuse to staff at the school, but often received no positive response. Mr. Stratton concluded that the staff had to have known what Moss was doing because they would have noticed him hugging and kissing the girls at every opportunity. Furthermore, Mr. Stratton noted that in 1982 the Superintendent and Assistant Superintendent had written to the Administrator of Family and Children's Services reporting that Moss "freely hugged [the residents], kissed them good night, set them on his lap and put his arms around them when walking with them."

The investigation also learned that in 1977 one of the former residents complained about Moss to the Assistant Superintendent (alleging kissing and fondling), and in 1979 the mother of another resident complained about Moss to the Superintendent (alleging sexual touching). Moss was never confronted with the first complaint. When asked about the second complaint he did not deny it, and eventually resigned. Mr. Stratton concluded that the school authorities were remiss in failing to respond in some positive way to the 1977 complaint, and that they ought to have acted "more promptly and decisively to investigate the [1979] matter or to refer it to the police for investigation rather than merely accepting Moss's resignation and closing the file."

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[54] Another individual came forward and complained about incidents which took place prior to 1967, when the school was known as the Maritime Home for Girls. This facility was not operated by the Province. The complaint was that a doctor had committed a serious sexual assault during an examination in his office.

[55] These allegations and others were the subject of a comprehensive investigation by the RCMP in 1991-1992. Early on, the Murphys reviewed the results of that investigation and advised Mr. Stratton of what the RCMP had found.

Mr. Stratton also raised the issue of whether Moss should have been hired in the first place. His work experience consisted largely of sales positions, and his education consisted of a "government high school equivalent course, Grade XII." The personnel committee recommended his employment nonetheless, feeling that his confidence and outgoing personality would be an asset to the school. Mr. Stratton questioned whether Moss actually had the necessary qualifications to be employed to counsel young, impressionable girls with various kinds of problems. He also commented that many of the other counsellors at the school similarly lacked the necessary training for dealing with the girls in their care.

After his resignation, Moss was rehired by the Department of Community Services in 1985 as a casual social worker in the Family Benefits section. Mr. Stratton expressed the concern that either Moss' employment record at the school was not checked before he was rehired, or it was checked and Moss was rehired as a result of his "influence at some higher level."

6. DARTMOUTH CHILDREN'S TRAINING CENTRE

The Dartmouth Children's Training Centre was a centre for the care of severely mentally challenged children. In the spring of 1993, an allegation of sexual abuse and several allegations of physical abuse were made against some of the staff and residents. The parents of three residents withdrew their children from the centre as a result. The allegations were investigated by the police and child welfare authorities, and an operations review was conducted to determine whether safeguards were in place to minimize the likelihood of abuse. However, parents involved in a group advocating de-institutionalization of handicapped children remained dissatisfied and wanted to pursue the matter further. Mr. Stratton wrote to the chair of the group. He was later advised that persons interested in having him investigate their concerns would contact him. In the end, only three individuals from two families came forward: Lorraine B., the mother of Tracey B., and Richard and Barbara H., the parents of Mallory H. Mr. Stratton conducted an investigation into each of their complaints.

Tracy B. ("Tracy") is a severely mentally and physically challenged young woman. She is totally blind, has limited verbal and cognitive skills, and a number of chronic medical problems.

On April 30, 1993, Tracy was removed from the centre. Her mother feared for her safety. Throughout the fall of 1992 and winter of 1993, Mrs. B. had noted significant changes in Tracy's mood and behaviour: she had become unusually self-abusive, was clearly agitated and would wake up in terror at night; she kept repeating the words "Tracy don't tell" and "Tracy not tell." Furthermore, a medical examination had disclosed that she was no longer a virgin.

Mrs. B. reported to the centre her concern that Tracy had been sexually abused, but senior management did not believe any abuse had occurred. Unsatisfied, Mrs. B. contacted officials at the Adult Protection Service. Eventually the police were called in and an independent investigator, Dr. John Anderson, was appointed.

Neither the police nor Dr. Anderson was able to conclude with any certainty that Tracy had been sexually abused. Tracy was physically incapable of assisting the investigation, and the police were unable to find any corroborating evidence sufficient to identify a perpetrator. Dr. Anderson felt that Tracy's behavioural changes and repetition of the phrases "Tracy don't tell" and "Tracy not tell" were suggestive of abuse, but neither a perpetrator nor a locale for the crime could be established. Further, he believed that there were possible innocent explanations for the physical evidence.

Mr. Stratton ultimately determined that he was also unable to conclude whether or not Tracy was sexually abused or explain the changes in her behaviour.

Mallory H. is a severely challenged young woman. She is visually, intellectually and physically challenged. She does not speak. She requires total care and is dependent on others for all her daily activities.

On April 15, 1993, Mallory's teaching assistant noted that the right side of her cheek and neck was red. Mallory was immediately taken for a medical examination. Dr. Kim McBride, a general practitioner, thought the injury looked like a burn. The area was very red and there were blisters on Mallory's skin.

Senior staff at the centre spoke to Mallory's care givers. The employee who had readied Mallory for school that morning reported that she had used a hair dryer on Mallory's collar in order to dry some drool. The experts were divided as to whether this was a possible cause. A plastic surgeon who examined the relevant information thought that the burn could have been caused by a steady stream of hot air from a hair dryer. But a pediatrician who examined Mallory was of the view that the injury was inconsistent with a burn from a hair dryer, and more likely the result of the splashing of a hot liquid.

Mr. Stratton felt it was more reasonable that Mallory was scalded with a splash of hot liquid than burned with a hair dryer. However, he felt this splash was most likely accidental, and he was unable to conclude who caused it.

7. NOVA SCOTIA YOUTH TRAINING CENTRE

The Nova Scotia Youth Training Centre was a residential school in Bible Hill, a town in central Nova Scotia. It was operated for the education and training of the mildly and moderately intellectually challenged.

One former resident came forward and gave a statement to the Stratton investigation alleging sexual abuse at the centre. She claimed that she was fondled and digitally penetrated by a counsellor, and fondled by another employee. Four other former residents came forward and alleged varying types of physical abuse, including kicking, striking, and (sometimes severe) strapping. Three of the former residents stated that they observed physical abuse perpetrated on other residents. One alleged that the residents had been treated like slaves and often left hungry. Four complained that they suffered long-term psychological and physical injuries as a result of the abuse.

Mr. Stratton determined that it was difficult to arrive at any conclusions regarding the five complaints. However, he noted that his investigators were satisfied that the complainants were truthfully reporting their recollection of past events.

No current employees were interviewed by the Stratton team. Three former employees provided handwritten statements. The Murphys also reviewed 10 reports of abuse that had been received by the RCMP from 1987 onward. They discovered that eight had been deemed unfounded, one had resulted in a conviction for sexual assault, and the last had led to a criminal charge which was still outstanding.[56]

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[56] The accused in this case was subsequently acquitted.

As was the case with the other institutions, only some of the complainants said they reported the abuse to staff. Responses from staff were mixed. The Stratton team failed to find reports of two of the complaints. Further, two employees who were supposed have received a complaint could not recall receiving it (although one admitted he could have). One, however, suggested that he had heard about the complaint and it had been "hushed up."

As was the case with other institutions, Mr. Stratton concluded that counsellors employed at the centre often had neither the training nor the experience to equip them for their duties. Three former counsellors at the centre acknowledged that they had essentially no relevant training before commencing work supervising residents. Mr. Stratton concluded the "lack of qualification and training on the part of the counsellors must surely account to a certain extent for some of the many complaints that have been brought to our attention in respect of four of the five institutions we have investigated." At the same time, he acknowledged that likely no amount of training would stop sexual predators or persons bent on inflicting violence on children in their care.

Mr. Stratton noted that a failure to complain was another common theme running through many of the statements he received from former residents of all the institutions, as was the failure of staff to believe the complaints that were made or to take any positive action in response. He stated he could "only infer that there was what I shall call a 'conspiracy of silence and inaction' probably inspired by a fear on the part of both residents and staff to 'rock the boat' or to draw unfavourable attention to themselves or to the institutions in which they were employed or resident." However, he also noted that it often might have been natural to disbelieve complaints of abuse made by children who, for varying reasons, might have had problems telling only the truth.

8. THE LALO CASE

Cesar Lalo was an employee of the Department of Community Services from 1971 to 1989. He began as a case worker responsible for, *inter alia*, supervising several young wards of the Department. He later became a youth court worker responsible for the supervision of young persons who had been placed on probation by the Family Court.

In early 1989, a former ward (whom Mr. Stratton referred to as C.L.1) disclosed to some friends that he had been sexually abused by Lalo while under Lalo's supervision. One of those friends reported the matter to the police. The police investigated and took a statement from C.L.1. An official from the Department of Community Services also conducted an investigation. He ultimately concluded that Lalo had taken advantage of C.L.1 and abused his position of trust. He recommended that Lalo be fired. His recommendation was accepted, and Lalo's employment was terminated on October 30, 1989. Lalo subsequently grieved his dismissal, but finally resigned on April 11, 1990, on condition that his dismissal be withdrawn and the Department agree to provide him with an employment reference. Lalo agreed not to seek a reference for any position which required him to work on a regular basis with children or young adults.

The Stratton team spoke to C.L.1. He recounted that Lalo had begun to abuse him when he was 12 or 13. The abuse initially consisted of Lalo grabbing him between his legs and asking for sexual favours. It later progressed to masturbation and oral sex. The abuse lasted for several years.

The police never laid charges in connection with C.L.1's complaint. Mr. Stratton was not certain whether this was because the authorities were unsure of a conviction or because of a reluctance on the part of C.L.1 to go to court. Mr. Stratton noted that those who interviewed C.L.1 believed he was telling the truth.

In response to Mr. Stratton's advertisements, four other individuals came forward to complain about Lalo. They reported varying degrees of improper behaviour, from an incident of sexually suggestive questioning to incidents of forced mutual masturbation and oral sex. One complainant indicated that Lalo introduced him to prostitution. In 1993 and 1994, Lalo was convicted of a total of four counts of indecent assault and one count of touching for a sexual purpose.

In response to the specific questions about the Department ot Community Services' response to the reports of Lalo's behaviour, Mr. Stratton found generally that the case was handled with thoroughness and dispatch. There was no unreasonable delay by senior officials in investigating C.L.1's complaint, no quiet dismissal of Lalo, and complete cooperation between Department officials and the police. Mr. Stratton's main criticism concerned a decision by the Halifax Regional Administrator of the Department in early 1989 not to inform her superiors of the police investigation into C.L.1's complaint. The investigating officer had asked her to keep the matter confidential while his investigation proceeded. When the administrator failed to hear back from the officer she assumed that the police had decided not to lay charges and she decided not to share her information with her superiors. The matter only came to the attention of her superiors when Lalo himself informed a co-worker that he was under investigation. Mr. Stratton concluded that the administrator ought to have at least informed her superiors of the existence of the complaint. Mr. Stratton also commented that the terms of the agreement for accepting Lalo's resignation were inappropriate. "To require the department to respond in a positive fashion to any request by Lalo for a letter of reference, even excluding positions requiring him to work with children or young adults, would, in my opinion, have amounted to misleading a subsequent employer and could have led to unfortunate results."

9. ANALYSIS

The Honourable Stewart Stratton, Q.C., is a jurist of impeccable credentials and reputation. The Government can only be commended for his selection. But what did the Government ask him to do? Mr. Stratton was given only six months and very limited financial resources to 1. investigate alleged sexual and physical abuse of residents at five separate institutions; 2. investigate and determine the practices and procedures in place at the institutions that either permitted or hindered the detection of abuse of residents; 3. investigate and determine whether any employees of the institutions or any public officials were aware of abusive behaviour of staff towards residents; and 4. investigate and determine what steps, if any, were taken by employees and officials in reference to any such abuse. He was later asked to expand his investigation to include an examination of how the Ministry of Community Services handled reports that a former employee, Cesar Lalo, had sexually abused children under his care.

It is unclear what the Government reasonably expected to obtain from this investigation, particularly as to alleged sexual and physical abuse of residents at the institutions. If Mr. Stratton was only to determine whether there were a sufficient number of complaints of abuse to warrant a public inquiry or an ADR compensation process which, itself, would evaluate the merits of individual claims, then perhaps Mr. Stratton's investigation could have served this end. If, on the other hand, Mr. Stratton's investigation was to determine, among other things, how prevalent sexual and physical abuse actually was at these institutions, such that his 'findings' could be used to support compensation for claimants without further verification of their individual claims, then it was inappropriate and doomed to fail. Yet the Government ultimately used Mr. Stratton's conclusions, time and time again, to confirm that widespread abuse had occurred, and to support the uncritical acceptance of claims of abuse, even those which were not brought forward to Mr. Stratton.

Why do I say that Mr. Stratton's investigation, if it was to determine the prevalence of sexual and physical abuse, was inappropriate and doomed to fail?

Apart from some admissions that some physical force (slapping, grabbing of arms, etc.) occurred that would now constitute abuse, and apart from conduct that had resulted in criminal convictions against MacDougall and others, the most serious sexual and physical abuse alleged to have occurred was challenged by the employees and former employees who spoke with the Stratton *investigators. Assessments of credibility were therefore central to any determination of how prevalent such abuse was.*

However, Mr. Stratton was not in any position to make assessments of credibility. Sixty-nine claimants alleged they had been abused. Eleven of them supplied their accounts in writing only. They were never seen by the Murphys or Mr. Stratton. Only one of the 58 other claimants was actually seen by Mr. Stratton personally. No one provided accounts under oath. No comparisons were made between accounts given to the Stratton investigation and to the RCMP, where applicable. In light of the time constraints, no effort was made to obtain relevant medical records from Roseway Hospital, or to search for institutional records of the residents or for employment records of the employees. At least three of the former residents who made serious abuse allegations against MacDougall were not at Shelburne when he was. This is an example of information which could have been, but was not, obtained by the Stratton investigation.

An additional 60 former residents were listed as possible victims in the Victim Abuse Log set up by the Stratton team. They were not contacted. There is no recorded effort to contact 10 former employees who were identified as abusers. They were never heard from. Subject only to very limited exceptions, Mr. Stratton did not attend employee interviews personally. The Murphys honoured confidentiality undertakings given to individuals alleging abuse. That meant that employees were invited to comment on whether they had abused anyone without any information as to who made the allegations, when the abuse allegedly occurred or the details of what allegedly occurred. To state the obvious, this made it virtually impossible for alleged abusers to have a meaningful opportunity to refute, or otherwise respond to, the allegations. The assurances of confidentiality also meant that accusers knew that they would not be required to confront their alleged abusers.

This is not to say that all the allegations made to the Stratton investigation were false. Indeed, it says nothing about the truth or falsehood of these allegations. But it does demonstrate that neither the Murphys nor Mr. Stratton were well situated to make findings of credibility or evaluate the merits of disputed claims or the prevalence of abuse generally.

Mr. Stratton recognized many of these limitations in his Report. He explained that he continued to refer to the former residents as "complainants" to maintain a proper balance. He acknowledged that the statements taken by his investigators were not sworn or tested by cross-examination; they described events from the distant past based on memories which could have been coloured by the self-interest of those who complained as well as those against whom complaints were made; and some complainants admitted they were looking for financial compensation for what *they had experienced. The investigation located very little written material that would have assisted in confirming the truth of what was alleged, either by the complainants or by the alleged perpetrators.*

It was appropriate that Mr. Stratton recognize these limitations in his Report, although, as I later note, these warnings went unheeded when the Government moved to the third prong of its response – the Compensation Program.

It was also appropriate that Mr. Stratton state, as he did, that there was physical and sexual abuse at some of the institutions examined. After all, convictions against MacDougall and others had already demonstrated that. Similarly, there was general agreement among former residents and employees that physical force had been used in the past by employees to control residents – force which might now be regarded as unacceptable, although the nature and extent of that force remained in dispute.

Beyond those conclusions – which were already known to the Government – Mr. Stratton could not find abuse, unless he resolved issues of credibility. He could only collect and document abuse allegations and report back to the Government as to what was and was not contested.

Mr. Stratton and the Murphys, in their frank discussions with my review, made it clear that they understood at the time that they could not make findings of credibility, based upon the manner in which the investigation was conducted. Nonetheless, Mr. Stratton's Report appears to do precisely that – draw conclusions that can only be regarded as credibility assessments. At the same time as he noted the limitations on his ability to evaluate the complainants' accounts, he concluded that on the whole he believed them to be generally reliable and accurate. Having noted again that the statements from Shelburne residents were unsworn and untested by cross-examination, he added that,

> *... leaving aside some exaggeration, I would note that my investigators are satisfied that in all cases, save perhaps 3, the complainants were attempting to recall from their memories and truthfully report events and circumstances that occurred some 20 to 40 years ago. With respect to the other three, I would report that my investigators believed that SSB1, who was taking medication for emotional problems at the time of his interview, may have embellished his story somewhat; that SSB76 did not display the usual indications of trauma as a result of his experiences at the school and that SSB109, who also suffers from severe emotional problems, gave his statement when he was in a highly emotional state and was perhaps for that reasons unable to name any of his abusers.*

Later on he concluded, generally, that he

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> *... could only infer that there was what I shall call a "conspiracy of silence and inaction" probably inspired by a fear on the part of both residents and staff to "rock the boat" or to draw unfavourable attention to themselves or to the institutions in which they were employed or resident.*

He expressed his belief that his investigation had gathered sufficient information for the Minister of Justice to be able to proceed with the next and final step of the process, without a public inquiry. In his view, the picture that emerged from his investigation, although unpleasant, was "nonetheless, fairly accurate."

With great respect to a learned jurist, the limitations upon his investigation were so fundamental and of such magnitude that no general conclusions as to the residents' allegations should have been stated, particularly publicly. It was no answer to say that the conclusions were qualified, any more than it would be fitting for a trial judge to state that an accused is probably guilty, although he or she has not yet heard all the evidence. The fact that a jurist of Mr. Stratton's stature found the abuse claims to be generally reliable and accurate could only contribute to the perception of the public and the Government that an objective, detailed investigation had confirmed the existence of widespread systemic abuse, perpetuated through a "conspiracy of silence and inaction." And that is exactly how the Report was received and acted upon.

Similarly, as elaborated upon in discussions with my staff, the Murphys viewed their goal to be the gathering of sufficient information to make a sound assessment of whether or not sexual and physical abuse had gone on at the institutions. They believed that this had been accomplished. They pointed out that certainly, on the face of the statements, abuse had occurred. Again, with all due respect, their perspective confuses two issues. There was no doubt – before the Stratton investigation even commenced – that physical and sexual abuse had occurred within some of the institutions. There was also no doubt – after the investigation was concluded – that, if one accepted the residents' statements at face value, many instances of abuse had occurred. The difficulty comes when Mr. Stratton and his investigators are called upon to determine something more about the existence, nature and breadth of that abuse.

As is implicit in my earlier comments, I am convinced that the Stratton investigation might have been better served if additional witnesses, institutional and medical records, and prior statements of complainants had been pursued. The investigation might have reflected greater balance if former residents who denied being victimized or having observed abuse had been interviewed, or if implicated employees had been able to respond to specific allegations. In fairness, such an approach was incompatible with Mr. Stratton's time constraints and limited resources. But even such an investigation – absent any real opportunity to meaningfully test the evidence proffered

– could not have provided the Government with sufficient assurances that the residents who complained to Mr. Stratton (apart from those whose veracity had already been established in the criminal process) could be compensated without further verification. So I return to my introductory remarks: if that was the purpose of the Stratton investigation, it was inappropriate and doomed to fail.

Mr. Stratton clearly felt that his investigation provided a sufficient basis to enable the Government to bypass a public inquiry and move directly to the ADR process. However, I readily accept his explanation to me that he never contemplated that his Report would be used to justify an ADR process that required little or no verification of individual claims.

The Government appears to have been largely committed to an ADR process before Mr. Stratton even began his work. Continuing on with that process seemed only to be contingent upon a finding by Mr. Stratton that physical and sexual abuse had occurred. Of course Mr. Stratton would find physical and sexual abuse – such findings had already been made at MacDougall's criminal trial. It is, therefore, difficult to see what Mr. Stratton could have found that would have reversed the direction of the Government's response. Indeed, it can be argued that Mr. Stratton's mandate was framed in a way that made it virtually inevitable that the Government would be proceeding with its ADR program after his work was completed.

In summary, I found the Stratton investigation to be well intentioned and executed with the utmost good faith. It did collect evidence of abuse that deserved the fullest consideration, through a true investigative process. However, I cannot help but conclude, for the reasons indicated above, that Mr. Stratton's conclusions went beyond the scope of what fairly could be said.

Mr. Stratton's mandate was ill advised and contributed to the unsatisfactory character of what followed. If the Government merely wanted confirmation of what was already known – namely that some abuse existed – the Stratton investigation was unnecessary and duplicated work that would have to be done by others, most particularly the police. If the Government wanted an accurate picture of the extent of sexual and physical abuse at the various institutions and of who had permitted the abuse to go on, Mr. Stratton should have been given the time, the resources and the powers to do that job properly.

I have said that Mr. Stratton's conclusions went beyond the scope of what fairly could be said. Perhaps the Government should have been more mindful of the limitations which he expressed upon his conclusions. However, given his well deserved stature, it is difficult to fault the Government for accepting his findings or for concluding that widespread abuse had occurred at the *institutions. Given his findings that the complainants who came forward were generally reliable and accurate, it might even be argued that the Government could not be faulted for awarding compensation to Stratton complainants without extensive verification of their claims. (I do not agree with this position, but I recognize that it has some force of logic.) However, based in part upon the results of the Stratton investigation, the Government created a Compensation Program with little or no verification of individual claims. No distinctions were drawn based upon whether the claims had been evaluated by, or even known to, Mr. Stratton, or when those claims were generated.*

This is not to say that only Stratton claimants could make valid claims of abuse. However, even the most generous interpretation of the Stratton Report could hardly justify the uncritical acceptance of unverified claims which were never made to Mr. Stratton.

VI

The Origin of the Compensation Program

1. BACKGROUND

As outlined in Chapter III, on November 2, 1994, the Minister of Justice announced that the Government would be prepared to offer compensation through an alternative dispute resolution ("ADR") process "if liability is revealed through the [Stratton] investigation."

In December 1994, Douglas J. Keefe, then Executive Director, Legal Services, of the Department of Justice ("Justice"), asked his staff to prepare for the Minister a short outline of the available options for an ADR process pertaining to the sexual abuse cases. This was done in a memorandum dated January 6, 1995, prepared by Alison Scott, a lawyer in the Department. It described the processes available both within and outside the judicial system. It was provided to Mr. Keefe and to D. William MacDonald, Q.C., Deputy Minister of Justice.[57]

Ms. Scott wrote that, outside the judicial system, the parties could adopt whatever arrangements they wanted to resolve disputes. These included mediation and binding or non-binding arbitration. Different combinations of alternatives could be used at different stages. For example, there could be binding arbitration for liability issues, but mediation to resolve the amount of damages. If mediation failed, the parties could agree to judicial intervention.

Scott noted that all aspects of ADR could be the subject of negotiation between the parties: whether arbitration or mediation would be adopted, who would conduct the mediation or arbitration, when and where it would take place, which issues would be subject to which process, what rights of appeal or other access to the courts would be available.

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[57] Mr. MacDonald replaced Gordon Gillis as Deputy Minister of Justice in January 1995. Mr. Gillis moved to the Department of Labour as Deputy Minister. He remained there until April 1, 1996, when he became Deputy Minister of the Department of Community Services. He rejoined the Department of Justice as Deputy Minister in June 1997.

Scott referred to a model adopted in Ontario which had involved approximately 400 claimants participating in an arbitration process, with an agreed upon ceiling on damages. Those who participated in the process had agreed to give up their right to litigate in exchange for a private arbitration process. If the claim was not substantiated, no award was made. If the claim was substantiated and the claimant proved damages, the damages ranged from a nominal amount to the ceiling amount.[58]

Scott advised that the Province could offer to use one form of ADR for all litigants, or it could tailor the ADR process to particular circumstances. She noted, for example, that some plaintiffs had already testified in Patrick MacDougall's criminal prosecution, and that their evidence had been accepted as true by the Court and had formed the basis for MacDougall's convictions. She further suggested that if the Province could determine liability from the Stratton investigation and Report, it could concede liability and either arbitrate or mediate the issue of damages with a ceiling. Where there was doubt about liability, the parties could agree to arbitrate or mediate both liability and damages or, if no agreement was reached, proceed to litigation.

In April 1995, Ms. Scott and Paula Simon, Director of the Victim Services Division, Department of Justice, attended a conference in Toronto on sexual abuse in institutional settings. After their return, Keefe advised the Minister of Justice in a memorandum dated April 28, 1995, that officials in the Department would like to emulate the models established in Ontario to resolve the St. John's/St. Joseph's and Grandview claims of abuse. He noted that the program in Ontario for St. John's/St. Joseph's had processed 383 claims, and that 600 additional claims had been made. He understood that Grandview had 500 claims or more. He said the "validation rate" for claims was 97%.[59] *As I later discuss, some of those involved in the design and implementation of the Nova Scotia Compensation Program failed to appreciate that a validation rate does not represent some immutable truth about the percentage of individuals who can be expected to make false claims, regardless of the design of the program.*

In his memorandum, Keefe noted that, at this point, there were 70 claims of abuse reported to Mr. Stratton. He suggested that three times that many claimants could come forward during the compensation process if the Ontario experience held true in Nova Scotia. He expected the validation rate would be nearly 100%. Keefe recommended that a working group be established to: 1. develop a strategy to deal with the anticipated compensation process following the release of the Stratton Report, 2. determine whether all cases of alleged abuse, including foster care situations, ought to be included in this process, 3. develop an immediate response to the Stratton Report, and 4. draft a memorandum to the Policy and Planning Committee of Cabinet ("P&P").

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[58] All of the Ontario compensation programs are discussed later in this Report.

[59] Though "validation rate" is not explained in the memorandum, it would appear to refer to the percentage of claims found to be valid for the purposes of compensation under the programs.

A working group was subsequently set up consisting of Justice employees Keefe, Scott, Simon, Fred Honsberger, Brian Norton and Peter Spurway. Its work appears to have been spearheaded by Scott and Simon.

In early June 1995, Simon spent three days in Toronto with staff of the Ontario Ministry of the Attorney General, researching the St. John's/St. Joseph's and Grandview ADR models. On June 26, 1995, Thomas Marshall, Q.C., senior counsel with the Ontario Ministry, came to Nova Scotia to present the Ontario models to the Justice Coordinating Committee of Justice.[60] The next day he presented the models to the Nova Scotia Cabinet.

Meanwhile, Simon and Scott prepared a detailed draft memorandum, dated June 22, 1995. With some minor changes in wording, it was signed by the Ministers of Justice and Community Services on June 30, the date the Stratton Report was released. The memorandum was considered by Cabinet on July 6.[61]

The memorandum referred critically to the approaches taken in Newfoundland and New Brunswick to reports of institutional abuse of children in provincial settings. It was complimentary of the approach taken by Ontario in the St. John's/St. Joseph's and Grandview matters. It identified four options and the likely cost of each. The options presented were based on the following assumptions:

- There were indications from Mr. Stratton that he had identified approximately 85 victims;
- Given the experience in other jurisdictions, the number of victims might at least double once the government began to compensate;

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[60] This is a committee of senior managers of the Department.

[61] A copy of this memorandum is included as Appendix "E".

- There was no easy or inexpensive solution to the issue. Whatever option was chosen would take substantial resources and time;

- Some victims might choose to litigate despite the offer of ADR.

The four options were:

I Adopt an ADR process, wherein victims would participate in negotiating the terms of settlement. This would involve a time frame of two years and eight months, and an estimated cost of $13,157,000.

II Determine the compensation package unilaterally (the New Brunswick model). This would have a time frame of three years and a likely cost of between $10.8 million and $21.1 million.

III Remain silent and deal only with the lawsuits as they proceed through court. The time frame for this option was considered to be five years with a likely cost of $11.395 million.

IV Litigate the first few claims and settle the rest based on court rulings. The estimated time frame was three years with a likely cost of $22.05 million.

In considering these options, the two Ministers – of Justice and Community Services – argued that one of the most important issues for the victims would be their need to feel heard by the Government. They said the ADR process would recognize this and, in fact, would engage the victims in the process by allowing them to participate in the negotiation of an agreement that would attempt to meet their needs. It was expected that there would be complaints regardless of the process selected. However, the ADR process gave the Government "its best defence": it would be hard to find fault, given that the Government was attempting to have an open, honest dialogue to reach an agreement that met all the parties' needs. Accordingly, the Ministers recommended that the Government accept social and moral responsibility for the abuse, adopt Option I, and move forward to assist victims of institutional abuse by:

- Agreeing in principle to ADR, understanding the potential costs;

- Establishing an Institutional Abuse Unit for a three-year period with the resources necessary to undertake the ADR process and manage the claims;

- Providing immediate counselling to victims;

- Immediately retaining the Family Service Association to administer the interim counselling agreements and commence an assessment of the likelihood of the victims being willing and able to structure themselves into a group; and

- Authorizing a budget allocation to Justice to cover the anticipated cost ($13.157 million).

The presentation materials prepared on overheads for Cabinet made reference to Mr. Stratton's "findings" that there were "89 identified victims" and more than "27 perpetrators." One overhead summarized Mr. Stratton's conclusions that:

- By 1975, staff and management at the institutions and in Community Services' Head Office knew of abuse;

- Ministers responsible failed to provide the necessary resources to the institutions;

- No public inquiry was needed;

- There was a high moral obligation on the part of the Government to assist the victims;

- The Nova Scotia response should be guided by experiences in other jurisdictions.

ADR was explained to Cabinet as being a negotiation process wherein the parties (namely, the victims' group and the Government) would engage in a series of meetings to reach an agreement "respecting a decision-making mechanism and outcomes." It was indicated that the decision-making would be done by an adjudicator based upon evidence under oath, validation, and outcomes with agreed-upon parameters. ADR was favoured because: 1. it would engage the victims in the process and give them some control, 2. it would create a healing package that would meet the victims' needs, 3. it would limit legal costs, 4. the victims wanted confidentiality, and 5. victims would have quick access to counselling services.

It was proposed that victims would be organized into an advocacy group by March 31, 1996, and that organizational and legal skills would be provided to the group. Negotiations would then begin between the Government, represented by a chief negotiator and legal counsel, and the victims, represented by legal counsel and one or two individuals from the advocacy group. This negotiation phase would be completed by March 1997. There would then be an adjudication phase wherein victim claim files would be assessed by an adjudicator who would determine the award and whose decision would be final. This adjudicative phase would be completed by March 1998.

Cabinet approved Option I, the ADR process.

On July 13, 1995, letters were sent to counsel representing plaintiffs and to individuals who had spoken to Mr. Stratton, advising them that the Minister of Justice would make an announcement on July 20th. They were invited to attend a meeting on that date to discuss compensation for victims. The meeting took place as scheduled. The Deputy Minister outlined the details of the Government's plan to compensate victims of abuse through an ADR process.

On July 17, 1995, an agreement for funding was signed by the Family Services Association ("FSA") and the Minister of Justice. In this document, FSA agreed to develop and administer an interim counselling service for anyone who was abused in the institutions covered by the Stratton Report, and for the victims of Cesar Lalo, the probation officer referred to in previous chapters. FSA also agreed to assess the viability of the victims forming one or more groups (for the purpose of negotiating appropriate compensation), to assist with the formation of such groups, and then to provide them with resources. The agreement stipulated that FSA, while independent, shall be financially accountable. It was to be the front-line agency that would have first contact with unrepresented potential claimants.

2. THE ANNOUNCEMENT OF JULY 20, 1995

On July 20, 1995, the Minister of Justice held a press conference at which he outlined the ADR option that had been approved by Cabinet. A press release was also issued, in which the Minister stated:

> Mr. Justice Stratton's investigation was just what the Government had hoped it would be – far-reaching, exhaustive, and respectful of the right to privacy of the victims. His findings – although not a total surprise, given the allegations and events at similar institutions in other jurisdictions – nevertheless, were shocking.
>
> There is no question that former residents of three provincially-operated institutions – the Nova Scotia School for Boys, the Nova Scotia School for Girls and the Nova Scotia Youth

> Training Centre – were victims of abuse at the hands of some of the people entrusted with their care.
>
> It is the opinion of the Government that the province of Nova Scotia has a special obligation – a moral responsibility – to the men and women who, as children, suffered abuse while in the care of publicly-operated institutions.
>
> The process I am announcing today cannot undo past wrongs. Rather, it is intended to help victims recover and rebuild lives that were damaged by the abhorrent and heinous acts of a few people, who grossly betrayed the trust they were given.
>
> The province undertook an innovative process in investigating these incidents. It was a process that first and foremost respected the rights of those individuals who had suffered. It respected their right to be heard, and their right to privacy.

The Minister then announced the components of the third phase of the Government's response:

- Counselling services for victims, already in place, would be expanded. The Family Services Association had been retained to provide interim counselling and provide an important, non-government contact point for victims;

- A 1-800 line had been established to provide easy, direct access to FSA. The number would be advertised. As well, Mr. Stratton would contact all victims that he identified to ensure they were aware that counselling was available and of the ADR process;

- An ADR process would be available to residents of any of the five institutions that were the subject of the Stratton investigation.[62] The victims of Cesar Lalo would be offered mediation as a method of determining compensation;

- The Family Services Association would assess whether victims could be organized into an advocacy group or groups, and would assist victims in establishing such a group. The advocacy group would be provided with publicly-funded legal representation. It would discuss a range of issues with Government. An agreement regarding compensation and other assistance for victims of abuse would be one objective of those discussions. Determining compensation and other assistance for victims would be done through negotiation and adjudication. An advantage of the

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[62] Mr. Stratton actually only found abuse at three of these institutions.

ADR process was that those who had been injured would be "at the table" when compensation and other responses to their victimization were put together. They would help determine the shape of that package;

- Once compensation levels were determined, each victim would choose whether to enter into an adjudication process. A victim could decide that litigation was more appropriate. However, anyone who did enter the adjudicative process would be required to waive their right to sue the Province. An independent adjudicator would assess individual files and award compensation, based on factors such as the level of abuse suffered;

- It was anticipated that the process would take 12 to 18 months to complete. This was "relatively fast" compared to other possible remedies;

- The Stratton investigation identified 89 complainants. The Government anticipated that others would identify themselves;

- This process would be focussed on the needs of the injured parties. The ADR model was designed to help those in need quickly and to ensure that public resources would benefit the victims, rather than be consumed by expensive legal processes. The Government's response throughout reflected an attempt to proceed always with the interests of those who were victimized in the forefront. This process was sensitive to their needs. It protected their privacy, offered immediate counselling assistance and would result in equitable compensation;

- The Stratton Report identified criminal activities. The Report had been turned over to the RCMP for appropriate action. The RCMP would respect the complainants' right to privacy. The Stratton investigators would make contact with victims, and only those who consent would be contacted by police;

- An internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. The internal examination would reach beyond those who may have perpetrated abuse. The actions or lack of action of those who could have or should have had knowledge of such abuse were also under investigation.

The Minister of Justice noted that the Government had first focussed on safeguarding present residents. There had been dramatic improvements in staff training and procedures in the years since the incidents that Mr. Stratton investigated had occurred. The Departments of Justice, Education, Community Services and Health were going to examine all policies and procedures concerning the protection of children in provincial care. Current procedures at provincial facilities for children had already been the subject of two independent studies. Viki Samuels-Stewart's examination of Waterville and Shelburne had resulted in changed procedures at both institutions. Ross Dawson's report on current procedures at the Nova Scotia Youth Training Centre and the Nova Scotia Residential Centre was expected any day.

3. ANALYSIS

This section of the Report describes the internal discussions that preceded the Minister of Justice's announcement on July 20, 1995 that the ADR process would go forward, in the aftermath of the Stratton Report. Some of my analysis here repeats, and builds upon, comments I made earlier when evaluating that Report.

It is clear that the Government was largely committed to an ADR process ***before*** *Mr. Stratton even began his work. The previous year, the Government had publicly announced its three-pronged response to reports of institutional abuse, which included an ADR process. Proceeding with an ADR process was said to be contingent upon a finding of "liability" by Mr. Stratton. However, the Government proceeded with the process even though, to be precise, Mr. Stratton did not find liability either on the part of individual employees or on the part of Government. Of course, he was not in a position to do so, given his mandate and the way in which his investigation was conducted. He did, however, articulate the Government's moral responsibility to provide redress for abuse perpetrated by its employees.*

It is probably more accurate to say that the Government intended to proceed with an ADR process if Mr. Stratton found that ***abuse*** *had occurred. However, it was inevitable that Mr. Stratton would find that physical and sexual abuse had occurred. Such findings had already been made in the criminal courtroom. As well, there was general agreement among former employees and residents that physical force had been used in the past by employees to control residents, although the nature and extent of that force remained in dispute.*

Beyond those conclusions – which were already known to Government – Mr. Stratton could not find abuse unless he resolved issues of credibility. His Report does appear to do just that but, *as I earlier noted, both his mandate and the form of his investigation prevented him from fairly and accurately doing so. Indeed, these limitations were so fundamental that no general conclusions as to the residents' allegations should have been drawn by the Government. Nonetheless, the Government used Mr. Stratton's Report to confirm that widespread abuse had occurred, and to support the adoption of an ADR process.*[63]

In his press conference on July 20, 1995, the Minister described Mr. Stratton's work as "far reaching" and "exhaustive." He did not caution the public that the 'findings' were qualified and made without the procedural protections available to accused persons (and, therefore, should not be used to infer abuse without verification in individual cases). It is apparent that the Government was swept up by the prevailing opinion that abuse was widespread and systemic.

In fairness, when the Government considered its alternatives in early and mid-1995, it was not yet clear that it would adopt an ADR process that involved little or no validation of individual claims. Ms. Scott's memorandum in January 1995 contemplated a validation process for disputed claims and noted that the process could be tailored to particular circumstances. She hinted that liability could be conceded in relation to plaintiffs whose evidence had been accepted in MacDougall's criminal prosecution. Implicit was a recognition that liability respecting other claims might have to be disputed. When the ADR option was presented to Cabinet in July 1995, it was proposed that decision-making on disputed claims would be done by an adjudicator, based upon evidence under oath and with validation. The terms of the ADR process would be negotiated once victims were organized into an advocacy group.

However, as we see later, when the framework for the ADR process was negotiated between the Government and counsel for the claimants, true validation of claims fell by the wayside, as did any requirement that statements be taken under oath. Negotiators also abandoned the requirement that a single advocacy group speak for claimants. Put simply, the ADR process that was ultimately negotiated was very different than that proposed to, and approved by, Cabinet in July 1995.

As will be developed throughout this Report, I am not satisfied that Cabinet always had a full and accurate presentation of the available options. However well-intentioned, the presentations to Cabinet at times virtually compelled rejection of alternatives to the ADR program that were worthy of greater consideration.

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[63] The criticism here is not so much that ADR was a bad idea, but rather that the Government's decision-making process was flawed.

For example, Ms. Simon's July 1995 memorandum to Cabinet presented four options and their estimated costs. The cost of Option III, litigating all cases, was anticipated to be $11.395 million (based upon $145,000 per case for two lawyers, a secretary, a paralegal, an articling clerk and disbursements). This estimate ignored the high probability that the Province would settle those cases (involving 15 complainants) in which convictions had already been entered. Option IV, litigating the first few claims and settling the rest based on court rulings, was expected to cost approximately double the amount of Option III, an estimate which, in my view, was unsupportable.

Furthermore, recognizing that in July 1995 Cabinet was only approving an ADR process that had yet to be negotiated, there nonetheless appeared to be little direction or consideration given to what impact this process might have on parallel disciplinary or criminal proceedings or on accused employees. This was a pattern which repeated itself over time as the ADR program was designed and implemented. As I later note, it had a significant impact on the ultimate success (or lack thereof) of the Compensation Program.

In his press conference, the Minister stated that Mr. Stratton had identified criminal activities and that his Report had been turned over to the RCMP for appropriate action. He indicated that the Stratton investigators would make contact with victims, and only those who consented would be contacted by the police. With respect, if these allegations of abuse were to be believed, they revealed, in many instances, serious physical and sexual abuse, sometimes perpetrated by current employees. Even recognizing the desire to accommodate the privacy interests of complainants, the Government was in breach of its duty to protect the public by giving complainants the absolute right to determine whether such abuse would be reported to the police. Admittedly, the authorities are entitled to exercise their discretion not to proceed on criminal charges, and this discretion may be based, in part, on the wishes of complainants, particularly their desire for anonymity. However, the public interest required that this decision be made by the authorities. Once a complaint has been made known to government, certain statutory obligations are triggered. These are designed to protect vulnerable persons from further abuse. It was only much later that the Government recognized that assurances of confidentiality offered to complainants by Mr. Stratton and then preserved by the Government were inappropriate and, indeed, possibly unlawful. I further consider this issue in a subsequent chapter.

4. NEGOTIATIONS

On August 11, 1995, a group of 15 lawyers, representing 65 claimants, rejected the Government's offer to negotiate with a *single* lawyer representing an advocacy group of claimants.

They informed the Minister of Justice that they – the lawyers – had formed an "advocacy group" and were prepared to enter collectively into discussions with the Government to determine an appropriate compensation mechanism. They sought a convenient date and time to begin discussions.

Alison Scott responded on behalf of the Department of Justice by letter dated September 21, 1995. She advised that the Province intended to honour its commitment to negotiate a framework with a lawyer representing an advocacy group to be formed with FSA's assistance. Negotiating with 15 lawyers would detract from the announced process. Therefore, the Province would not be complying with the request to commence discussions.

Scott's letter sparked highly critical correspondence from counsel in the group representing claimants. They asserted that the Government's rejection of their proposal to negotiate was injurious to victims, and demonstrated a callous disregard for the injuries already suffered by victims. Derrick Kimball, counsel for a number of claimants, advised the Minister of Justice that they would make the matter a public issue and consider jointly advocating a full public inquiry of the events and the Government's conduct if the Government did not change its position by September 27th.

The Minister of Justice responded on September 27th, confirming the Government's commitment to its earlier announced process. It was said to be based on the Grandview experience, which had proven successful in Ontario.

This, in turn, led to a press release by Mr. Kimball dated September 28th, stating that the Minister of Justice had "refused to negotiate a compensation package with lawyers representing 93 survivors of abuse suffered while residents of provincial institutions as young children." Mr. Kimball added:

> I am shocked that the Minister of Justice of this Province would refuse to acknowledge that these victims of the most horrendous and dehumanizing abuse imaginable, would be denied their right to legal representation of their choice in dealing with the Province of Nova Scotia. Bill Gillis admits the Province has a moral responsibility to compensate these innocent victims of abuse, but refuses to negotiate with their representatives ... Bill Gillis won't negotiate with these people because they have the temerity to have their own lawyers. This demonstrates a shocking lack of fairness on the part of the Minister of Justice.

On October 17, 1995, the Minister of Justice issued a press release, providing a progress report on the Government's response to the Stratton Report. He referred to the announcement of July 20th, and the acceptance of "moral responsibility" by the Province to help victims of abuse. He also acknowledged that the Government had an obligation to keep people informed regarding the progress being made on the Government's response to the Stratton Report. He advised that, to date, 134 individuals had contacted FSA regarding the ADR process. Of that number, 69 had indicated their desire to participate in the process. FSA had advised the Government that 76 individuals had been referred to counselling services.

In July 1995, Paula Simon was appointed Manager of the Compensation for Survivors of Institutional Abuse Program (the "Compensation Program"). In response to the position being voiced by counsel for claimants, she wrote detailed letters to the counsel involved, explaining the role of FSA and the commitment of the Government to assist survivors of abuse and work toward an ADR process that adequately dealt with the interests of survivors. Simon also met personally with a number of these counsel. It was suggested to her that claimants be allowed to have funded counsel represent them both in the negotiation of the framework agreement and in the arbitration of the claims for compensation.

A meeting was held on November 28, 1995, involving officials from Justice and FSA. Materials prepared for the meeting by Justice defined the "parties" having an interest in the formulation of a compensation program to be: the Government, survivors, lawyers for the survivors, FSA, the public and the media; employees – the individuals accused of abuse – were not mentioned. The materials indicated that there were now 21 lawyers representing 109 clients. FSA had more than 165 clients.

At the meeting, Dr. Elsie Blake, President of FSA, expressed her opinion that, due to a variety of factors, FSA was not likely to be successful in forming one advocacy group to represent all the interests of the various claimants. It was recommended that the Government meet with FSA and the lawyers for the claimants in an effort to negotiate a framework agreement. The process would then move to step two, wherein claimants would have the option to either have a lawyer present their claim or have a compensation consultant (a provincial staff employee) gather the necessary information, complete the file and appear before the adjudicator. If the award was unacceptable, the claimant could still proceed to litigation. It was also recommended that, if no framework agreement could be negotiated with counsel for the claimants, the above proposal be put to claimants directly. It was believed that most claimants would accept the proposal, regardless of the views of their counsel.

This meeting led to a Government decision to abandon its requirement that the framework agreement be negotiated with one lawyer representing an advocacy group of claimants. On December 4, 1995, counsel for claimants were advised that the Government was prepared to negotiate with multiple counsel, as well as a lawyer to be retained by FSA to provide representation for those claimants who did not wish to retain their own counsel or who had not yet done so. It was suggested that a meeting could be held near the end of January 1996.

On January 29, 1996, FSA retained Anne Derrick to represent survivors[64] of institutional abuse who had not yet retained, or had discharged, counsel, but who wanted to participate in the compensation process.

Ms. Simon and counsel for the claimants agreed to conduct negotiations commencing in February 1996. Two co-facilitators, J. Mark McCrae and Francine MacIntyre, were selected to assist in the process. Both were lawyers with recognized expertise in mediation and arbitration.

Government officials met on January 18 and 19 to prepare for the negotiations. These meetings were designed to be an exercise in team development, to educate the participants about interest-based negotiations, and to update them on recent developments. Those in attendance attempted to identify the interests of the survivors and the Government. The latter's interests were identified as follows:

- Fair compensation
- Meet victims' needs
- Spend as little as necessary
- Put money into survivors' pockets
- Litigate high end or complex cases
- Quick resolution
- Avoid things that make claimants distrustful of the Government
- Be a good listener
- Build positive relationships – be responsive/sympathetic
- Avoid litigation
- Avoid bad press
- Avoid a public inquiry

The Government negotiation team's goals for the first day of the upcoming negotiations were to know all the issues, obtain a 'wish list' from claimants, determine their level of commitment to the process, estimate how long the process would take, and ascertain what kind of result would likely emerge from the negotiations. In the detailed agenda documents (which reflected what was contained in the materials prepared in November), the parties to be considered were identified as follows:

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[64] I use the term "survivors" to reflect the language employed by the parties at the time. I am mindful, however, of the issues associated with this term, as discussed in Chapter I.

- Government
- Survivors
- The survivors' lawyers
- Family Services Association
- Public
- Media

The focus on these parties and their interests was confirmed in follow-up notes distributed on January 22, 1996. The documentation does not indicate that any role was considered for former and current employees accused of abuse. In interviews with my staff, the Government negotiators confirmed that the interests of employees were not considered in the run-up to, or during, the negotiation process.

The Province's negotiating team was headed by Ms. Simon. It included Alison Scott, from Justice, Amy Parker and Mark Covan, then relatively junior lawyers with Justice, and an advisor, Heather de Berdt Romilly, Senior Policy Analyst with the Department of Human Resources.[65]

Initially, negotiations were scheduled for three days, February 3, 10, and 17, 1996. Ultimately, seven meetings were held. The last two were primarily devoted to legal fees and the timing of payment to lawyers.

In describing the negotiations, I have relied upon the interviews conducted by my staff with all members of the Government's negotiating team, as well as with two of the counsel for the claimants, Anne Derrick and John McKiggan. Also available to me was a mass of documents, including: 1. agendas of meetings, 2. informal minutes maintained by Justice, 3. correspondence amongst counsel for claimants, the Government and the co-facilitators, 4. multiple drafts of a framework agreement, and 5. notes of departmental meetings and briefings. It is unnecessary to describe each of the many positions advanced during the negotiations. I am, however, able to reconstruct the important features of the negotiations.

At the first meeting on February 3, 1996, 24 claimants' counsel were present. Three others could not attend. These 27 counsel represented at least 212 claimants. In keeping with the

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[65] Ms. De Berdt Romilly is a lawyer with an interest and expertise in mediation and arbitration. Although she did not take an active part in negotiations, she attended the meetings and provided advice to the Government team.

Government's stated goal that the process be 'survivor driven,' its negotiators asked claimants' counsel to provide them with their 'wish list.' Claimants' counsel presented a draft of a compensation package that was stated to be based loosely on the Grandview agreement. The key features of this preliminary document were:

- Victims of physical and/or sexual abuse were to be eligible for compensation where it was established that the abuse occurred;

- The Government would have 30 days to respond to a demand for compensation. If the parties could not agree, then the claimant could either refer the claim to binding arbitration or pursue litigation;

- The arbitrator would have jurisdiction to decide all questions of fact, in particular whether physical or sexual assault had occurred and the appropriate quantum of damages. There would be a list of 20 arbitrators (lawyers or retired judges) with the claimant having the right to select the arbitrator from the list. Monetary compensation would be based on the seriousness of the harm caused;

- Any amount left over from the $10 million the Government had set aside for survivors of institutional abuse would be divided pro rata among compensated survivors and proportioned to the awards received.

Notes made by the Government negotiating team on February 6, 1996, identified the following as issues that needed to be addressed:

> Compensation
>
> **Does it include physical, psychological and sexual abuse?**
>
> **What constitutes abuse (is racism abuse)?**
>
> **What institutions would be covered by the framework agreement?**
>
> **Is abuse by other residents compensable?**
>
> **Abuse of authority.**
>
> **Will compensation include aggravated or punitive damages?**
>
> Validating Claims

How to establish facts/claims – arbitration, negotiation or mediation.

Arbitrators to make decisions.

Who will be on the list of arbitrators.

Access to Records (Institutional and Medical)

Claimants will need access to evidence and documents to prepare their claims.

The role of expert's reports.

Payment for medical reports to be used in the claim process.

The injury to be compensated would necessarily be connected to abuse at an institution.

Release.

In preparation for the second meeting, notations made by the Government officials reflect that the status of the criminal investigation and the investigation being conducted by the Internal Investigations Unit ("IIU") were to be discussed.[66] The Government was to propose that no validation of a claim would be needed if there had been a related criminal conviction. Otherwise, the Government would accept statements taken by the Stratton investigators (the Murphys) or the IIU. The Government would have to confirm that the claimant and employee attended the institution at the same time, and might also have to look for medical records. However, 30 days was an acceptable time frame in which to respond.

On February 10, 1996, the second meeting was held. The unofficial minutes kept by the Government negotiating team reveal that the following discussions took place at that meeting:

- There were now 309 claimants, with eight counsel who had not responded to inquiries as to the number of clients they represented.

- The Government would not be prepared to go higher than a cap of $120,000 compensation. However, counselling would be in addition to that amount. The cap was based upon a proposed summary validation process and the amounts conferred by compensation programs in other jurisdictions. In addition, compensation would be paid for both sexual and physical abuse.

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[66] This was a unit created to investigate complaints against current employees. The creation and early operation of the IIU is described later in this chapter.

- The Government wanted to have a quick process. If claimants wanted to have higher amounts of compensation, they would still have the option of pursuing their claims in court.

- The Government said that it was looking for a summary validation process. If there was a criminal conviction, no more validation would be necessary. In addition, the Government would be willing to accept the Murphy reports or the IIU reports.

- There was discussion as to what would be involved in arbitration. Would it be a mini-trial or a file review by an adjudicator without a hearing?

- The Government team was aware that the IIU had collected a lot of records unavailable to Mr. Stratton, and so informed claimants' counsel.

- Claimants' counsel were concerned over the proposed $15,000 cap on physical abuse. They proposed a compensation matrix with a cap of $150,000 for sexual abuse and $60,000 for physical abuse, if there were long term or psychological injuries.

- Claimants' counsel believed that the majority of claims would be for physical abuse. In contrast, the Government negotiators stated that, based on information from the Murphys, 75% of the claimants alleged sexual abuse.

The fact that there were now at least 309 identified individuals who would be seeking compensation was going to have a significant impact on an earlier budget based on 170 potential claimants. Ms. Simon drafted an options paper for the Deputy Minister, dated February 13, 1996. In it, she set out the factors that were at play in reaching the decision to offer an ADR process for survivors of abuse:

- The Government should move quickly to respond to survivors' needs;
- The litigation process would re-victimize survivors;
- The ADR process would give survivors an opportunity to tell Government how their needs could best be met; and
- Quick action might lessen the call for a public inquiry.

Simon expected the number of identified survivors to grow. While the extent of anticipated growth was difficult to estimate, she presented cost projections based upon 500 "clients." She then identified four options:

> I Continue with the ADR process (based upon a $120,000 cap with an estimated average award of $60,000) and increase the budget allocation;
>
> II Terminate the ADR process and offer a cap of $60,000, as was imposed for Grandview. This would reduce the budget estimate from 30 million to 15 million dollars;
>
> III Take the present allocation of 12 million dollars and divide it between the survivors (thereby giving each survivor $25,000 immediately);[67] and
>
> IV Discontinue negotiations and litigate claims.

Simon recommended Option I. She concluded: "it is my opinion that we are too far into this process to back away now without causing serious damage to the survivors and to the perceived good will of Government."

Given the increase in the expected number of claimants, the Minister decided to seek further instructions from Cabinet. In order for Cabinet to make an informed decision, Simon requested that the parties continue with the planned meeting of February 17th. In particular, the input of counsel for the claimants would be sought on the development of the compensation matrix and where their clients would fit within it.

By the meeting of February 17th, Government negotiators understood that 317 claimants had been identified. In addition, eight or nine counsel had not provided them with client numbers. Ms. Derrick advised us that Government officials were cautioned that the numbers of claimants could easily exceed 1,000. Ms. Simon acknowledged that the Government team did not know where the numbers would end up, but made the assumption, given the amount of publicity about the program, that the vast majority of individuals who had been victimized had come forward by that time.

A further meeting was scheduled for February 24th. Prior to that meeting, counsel for the claimants revised their February 3rd draft framework agreement. The new draft provided for a three-step process of negotiation, mediation, and arbitration. The Province would have 30 days to respond to a claimant's demand. If the parties had not reached a negotiated agreement within 30 days of the initial demand, or such further time as the claimant might agree to, then the claimant could submit the claim for summary mediation, if the Province consented. Written materials would be filed by the parties. After hearing from the claimant and the Province through counsel or otherwise, a mediator would render a summary recommendation for settlement without reasons. The claimant would also have the option, either immediately after failed negotiations, or where the mediator's recommendation was not accepted by either party, to submit the matter to binding arbitration. The arbitrator would be required to adhere to strict time lines in holding a hearing and rendering a decision.

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[67] Cabinet had approved a budget of $13.157 million. It is unclear why Ms. Simon referred to an allocation of $12 million.

The unofficial minutes of the meeting reflect that the Government advised it would be able to respond to a demand within 30 days. However, it objected to a proposed model that included an arbitration hearing. The Government negotiators proposed a "simplistic" validation process wherein adjudicators would conduct binding file reviews that would not involve hearings. The Government would be prepared to rely on the Murphy statements. Counsel for the claimants supported arbitration, believing there would be some cases where the investigators may not be satisfied as to the truthfulness of the claim; the Government's proposed summary process would dispense with the usual testing of evidence. The Government negotiators took the position that, with only a couple of exceptions, they regarded the statements of abuse as true and did not, therefore, generally anticipate disputes over whether abuse occurred. The exceptions cited were those cases where the alleged perpetrator or victim was not at the institution at the time. The Government was concerned that arbitration hearings would be time consuming and add to the costs of the process.[68]

Given the differences between claimants' counsel and the Government negotiators, the former took the position that, although they were participating in the process and might have to live with the terms imposed by Government, they were not parties to an agreement. Hence, a consensus was reached to call the governing document a Memorandum of Understanding ("MOU").

The next meeting date was set for April 3, 1996, to allow sufficient time for Cabinet to consider the matter. Ms. Simon advised the participants that the Government negotiating team would be making their own recommendations to Cabinet. These recommendations would take into account the positions developed in the meetings, but would not include the latest MOU draft submitted by claimants' counsel. It was agreed, however, that Ms. Derrick and Mr. McKiggan would draft a proposed description of the healing and restorative components of the program for inclusion in the MOU.

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[68] Other non-monetary items were also discussed at the meeting, including the cut-off date for claims to be submitted.

After the meeting, claimants' counsel circulated a revised Memorandum of Understanding that added a preamble and further terms to the document. Counsel for the claimants still proposed a three-step validation process of negotiation, mediation and binding arbitration. However, it was now provided that the arbitration hearing would not exceed three days in length. Derrick and McKiggan also wrote to Simon recommending counselling in the amount of $5,000 for every survivor, renewable as needed, to a maximum of $20,000. They further proposed that substance abuse treatment and crisis intervention be provided, and that the Government fund a professionally produced video of survivors' testimonials to honour their struggles, provide recognition of the wrongs done to them, and educate against such abuse occurring in the future. Alternatively, the Government could fund and facilitate the preparation of a public report containing testimonials from survivors.

On March 7, 1996, Chief Superintendent D. L. Bishop of the RCMP wrote to the Deputy Minister of Justice regarding the status of the police investigation into the allegations stemming from the Stratton Report. He indicated that the police had identified 410 alleged victims and 206 suspects. Those numbers were expected to increase as the investigation progressed – a process which Bishop estimated would take at least two years.

Ms. Simon and Ms. Scott prepared a memorandum for Cabinet, dated March 8, 1996. The memorandum advised that there were now 43 lawyers representing approximately 350 survivors. It described the degree of goodwill developed during the meetings with claimants' lawyers and lauded their demonstrated commitment to making the ADR process work for their clients. They said there was no question that there was a strong shared interest in quick resolution. The issue was described for Cabinet as follows:

> The Government has made a number of public statements committing itself to the ADR process. The number of survivors coming forward has dramatically increased, thereby substantially increasing the resources needed to compensate the survivors. It is difficult to estimate precisely how many more survivors will come forward. However, the present cost projections are based upon 500 survivors, which will increase the budget estimate from $12 million to $33.3 million.

Cabinet's options were listed as these:

- Option I – continue with the ADR process presently under way and increase the budget allocation. This was said to involve a time frame of eight months, with a cost of $33.295 million;

- Option II – offer ADR, but make payments over time. This option was estimated to cost $50.63 million plus interest, and take five years;

- Option III – discontinue ADR and litigate claims. This option was estimated to cost $61.1 to $66 million, and take 5 or more years.

The Memorandum then made these recommendations:

- The Government should continue with the existing ADR process and allocate the necessary resources to compensate the survivors at a total estimated cost of $33.295 million (Option I);

- The Government should provide a public apology as well as a written apology to survivors;

- Survivors' awards should be exempt from income for the purpose of calculating social assistance benefits;

- The cut-off date for applications for compensation should be six months;

- The Government should fund the Family Service Association to administer the counselling program;

- A fund should be established for a crisis intervention help line for one year;

- The Government should fund the recording of survivor stories in a manner to be agreed upon by the parties;

- The Government should pay the survivors' legal costs based upon negotiated caps that will not exceed 10% of the compensation agreement.

The memorandum was later submitted to Cabinet by the Minister of Justice. The Deputy Minister also submitted an accompanying memorandum. In it, he said:

> I think it is important for this Government to compensate fairly for abuse that has occurred in the past. I think it is possible to reach an agreement with the lawyers representing victims if Cabinet approves the recommendations in the attached memorandum. If we are unable to resolve this in a satisfactory manner soon, I am concerned there will be significant negative

comment in the press and negative editorial comment fuelled by the large number of lawyers and victims.

At a meeting on March 21, 1996, Cabinet adopted the recommendation to move forward with the ADR process and to compensate survivors as proposed. It must be noted that Cabinet had not been presented with any proposed MOU or with any final position as to the levels of compensation for individual claimants.

When Government negotiators and claimants' counsel next met on April 3, 1996, the Government presented a draft MOU. It provided, amongst other things, that survivors whose claims were determined to be valid either through negotiation or file review would be compensated for both sexual abuse and physical abuse perpetrated, condoned or directed by employees of the Province while the survivors were resident in the institutions. Disputes respecting the truth of the allegations of abuse or the quantum of compensation would be resolved either through negotiation or through the file review process. The Government was to respond to a demand within 45 days.

The unofficial minutes of the meeting reflect that counsel for the claimants were assured that the Government would have to have a concrete reason for doubting a claim. Such situations would be few in number. Generally, the Government would take the survivor's word that he or she had been abused. As a result, medical and psychiatric reports would be unnecessary. Although the Roseway Hospital had some medical records, the Government would not be testing claims (presumably against those records) to any great extent. Various other issues were also discussed, including the meaning of condonation, when a release had to be signed by a claimant, and the payment of legal fees incurred by claimants in initiating civil litigation, participating in the negotiations, and pursuing the compensation process contemplated by the MOU.

The sixth meeting was held on April 10, 1996. It dealt almost exclusively with the payment of legal fees. According to the unofficial minutes kept by the Government team, Ms. Simon stated that 10 hours was a reasonable limit for claimant legal fees incurred during the compensation process, given its summary nature. The minutes also record her commenting that if the Government proceeded with the proposed process, it would be very open to invalid claims. There would be a need to ensure that people coming into the process were telling the truth. She stated that the Government expected a lower percentage of invalidated claims than the three percent reported in Ontario. However, the minutes also indicate that Ms. Simon suggested "an onus need be placed on clients to be valid." *I am not convinced that these minutes, which appear to record somewhat inconsistent comments made by Ms. Simon, are entirely accurate. In some respects, they also do not appear to conform to comments made by Ms. Simon to my staff. It seems clear, from the totality of* *materials and witnesses available to me, that Ms. Simon was a strong proponent of the proposition that the vast majority of claims were valid and rigorous verification was not required.*

The seventh and final meeting was held on April 20, 1996. The principal topics of discussion were legal fees and the timing of payments to the claimants' lawyers.

On May 2, 1996, Mr. McCrae and Ms. MacIntyre circulated the final version of the Memorandum of Understanding to the claimants' lawyers. As noted in their cover letter, a signature by counsel signified consent as to form only. Each claimant would decide individually whether or not to participate in the process set out in the MOU. The effective date of the agreement was June 17, 1996, with a cut-off date of December 18, 1996 for filing claims.

On May 3, 1996, the Minister of Justice announced in the legislature the establishment of the Compensation Program. As part of that announcement, he delivered this apology:

> At this time, formally and publicly, I want to apologize to the victims. They were in no way responsible for what happened to them. On a personal level, and on behalf of the Government of Nova Scotia, I want to say sincerely, I am sorry. Also, I will be conveying my apology to the victims in writing. We cannot change the past. We cannot make up for the suffering that has been inflicted but we can help victims to rebuild their lives and their futures.

Terence Donahoe, then justice critic for the Official Opposition, responded to the announcement by applauding the Government. He said it appeared that a "very serious, legitimate and sensitive approach [had] been taken to respond" to the problem. He also extended his party's apology to the victims of abuse.

Throughout the discussions leading up to the MOU, there appeared to be little discussion of the legal status of the end product. The Minister referred to it as an agreement. As earlier noted, claimants' counsel may not have regarded it in the same way. Interestingly, the status of the MOU was later revisited (as discussed in a later chapter) when the Government made unilateral changes to the program mid-stream.

5. ANALYSIS

This section of the Report documents the discussions that led to the creation of the MOU. The discussions between claimants' counsel and Government officials were characterized differently by each in their interviews with my staff. Government officials regarded them as true negotiations, *leading to agreement. Claimants' counsel felt that there was a power imbalance in favour of Government, to the point that terms were often imposed, rather than negotiated.*

In my view, inadequate consideration was given to what the MOU's legal status was. This later became obvious when the Government made unilateral changes to the program, scrapping the MOU. Having said that, I am not persuaded that the claimants' counsel were at such a disadvantage that their discussions cannot be regarded as negotiations. The claimants were represented by forceful and effective counsel. Public opinion largely favoured their position, putting pressure on the Government to fully accommodate their interests. Paula Simon, the Government's chief negotiator, was herself highly motivated by experience and background to recognize the claimants' plight. The Government had already announced that an ADR program would be negotiated with the full participation of claimants' counsel. Finally, the terms of the MOU belie any suggestion that the Government imposed a one-sided process upon claimants. On the contrary, some features of the MOU support the view that claimants' counsel were full participants in the process. For example, claimants were given the right to choose the person who would conduct the file review of their claim, from a list of file reviewers chosen in advance by the claimants (and accepted by the Province).

During these negotiations, it became apparent that the number of claimants had dramatically increased, and was continuing to increase. Based upon the 89 complainants who came forward to Mr. Stratton, the Government had contemplated that two or three times that number might advance claims. It was felt that this estimate was supported by the experience in other jurisdictions. However, by March 8, 1996, it appeared that the number had grown to approximately 350. (Indeed, on March 7, 1996, the RCMP advised the Deputy Minister that 410 alleged victims had already been identified.) As the numbers increased, cost projections were adjusted to anticipate 500 claimants. These numbers caused Government officials to reconsider the available options. For example, in February 1996, Ms. Simon considered whether the budget should be increased to $30 million, the cap should be reduced to $60,000, the present budget should simply be divided amongst all claimants or negotiations should be terminated altogether. What is striking – indeed remarkable – is that there is no demonstrated appreciation that the number of claimants should invite some introspection about the validity of all of these claims. Indeed, if one examines the cost estimates presented by Ms. Simon, they assume the validity of all 500 claims!

This attitude is seen in the Government's negotiating stance on validation. In discussions with claimants' counsel, Government negotiators suggested that validation was unnecessary where criminal convictions had been registered. This was an appropriate concession. Where validation of a claim is inherent in a criminal finding of guilt, it should be unnecessary to compel the claimant *to re-establish the abuse. However, the Government promoted minimal validation for all other claims as well. It was looking for a summary process. With few exceptions, the Government regarded the statements of abuse to be true and did not generally anticipate disputes over whether abuse occurred. As a result, statements taken by the Murphys or by the IIU would be accepted. At times, Government officials indicated that they would look for documentary confirmation that the employee and resident were at the institution at the same time, and that some medical records might have to be examined. But the view was also expressed that medical and psychiatric records would generally be unnecessary. There would have to be a concrete reason for doubting a claim.*

It is ironic that claimants' counsel, concerned that their clients might be disbelieved, advocated a more stringent type of validation process: an arbitration hearing to resolve disputed claims. Later, to respond to the Government's desire for a speedy process, they proposed that the hearing not exceed three days. However, this was rejected by Government officials.

It is not surprising that Government officials did not contemplate the possibility that employees should be parties to the negotiations that led to the MOU. The alleged abusers had not participated in similar programs in Ontario and elsewhere. Their participation alongside claimants would have been regarded, given the outlook at that time, as re-victimizing the victims. As well, the point would have been made that employees were not affected by this process: they were not being asked to make admissions of liability or compensate the claimants. It is, however, surprising that Government negotiators did not even contemplate a role for employees in being heard as to whether the claims were valid, that is, as part of a validation process.

In my view, the position advanced by the Government negotiators that little or no validation was required for claims was a recipe for disaster. It was unsupported by the Stratton 'findings.' As I earlier noted, even the most generous interpretation of the Stratton Report could hardly justify the uncritical acceptance of unverified claims which were never made to Mr. Stratton.

The Government's approach was rooted in several fundamental errors. It is necessary to elaborate upon two of them here.

It is well recognized that the trial process can have a potential adverse effect upon those who have truly been the victims of sexual and physical abuse. Government negotiators, and others who designed the Government's response to reports of institutional abuse, had a legitimate concern that victims not be re-victimized through highly adversarial litigation that would force them to re-live their abuse, see the veracity of their claims disputed and, in some cases, endure public shame, embarrassment and even ridicule. The latter was of particular concern for those who had put their *prior lives as young offenders behind them. A public airing of their claims might expose their past to those close to them.*

These concerns justified consideration as to how the emotional well-being and privacy interests of claimants could be sensitively accommodated. I have no doubt that, in designing its response, the Government was also motivated by concerns over its finances and public perception of its attitude to abuse and abusers. These concerns made it predisposed to an approach that would avoid a public inquiry, and dispose of the issue expeditiously and in a way compatible with fiscal constraint.

However, in addressing its concerns, the Government fell into fundamental error.

First, there was often an uncritical acceptance that all but a minute number of claims would be legitimate – regardless of who was making the claims, how the claims had been generated, the existence of any motivation to make false claims and, most important, the absence of any meaningful disincentives put in place to the making of false or exaggerated complaints.

This somewhat rigid perspective to the credibility of claimants may be viewed in the context of how the credibility of sexual abuse complainants had been addressed in the past.

In times gone by, the credibility of sexual abuse complainants was often discredited based upon a notion that such complainants were presumptively unreliable. Some time ago, the Criminal Code removed requirements that sexual offence complaints be corroborated in order to be relied upon in criminal proceedings, or that mandatory directions as to the dangers of acting upon uncorroborated complaints be given to juries. Now, the presence or absence of corroborative evidence is merely a circumstance to be considered in assessing the veracity of any witness. It is accurate to say that "[t]he removal of statutory provisions that these witnesses need be corroborated or need to be the subject of a caution recognizes that they are not presumptively unreliable but should be evaluated on the basis of the strength or weakness of their evidence in each case."[69]

Similarly, sexual offence complainants were historically discredited based upon stereotypical notions or myths as to how true victims of sexual abuse could be expected to act. For example, it was felt at one time that an allegation of sexual abuse was inherently unreliable unless the complainant made a complaint or disclosure immediately or shortly after the event. Indeed, judges were obligated to instruct juries that an adverse inference could be drawn against a sexual offence

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[69] Robins, *supra*, at p. 270

complainant who did not make a 'recent' or 'fresh' complaint. Again, legislative and judicial interventions have now made clear that the importance to any complainant's credibility of the absence of a timely complaint should be decided on a case-by-case basis. "[T]he significance of a complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based on now-rejected stereotypical assumptions of how people, particularly young people, react to being sexually abused."[70]

Judicial and legislative developments that permit the evaluation of sexual offence complainants, indeed any witnesses, free from stereotypical or discredited notions about their credibility, can only be welcomed. However – and here is the critical point – these stereotypical or discredited notions cannot be replaced with equally pernicious notions that all sexual offence complainants should be regarded as presumptively reliable, regardless of their backgrounds or the circumstances under which their complaints were brought forward.

This point can be illustrated in a variety of ways. Sexual abuse claimants should not be regarded as immune from the temptations and incentives – particularly monetary – that move human beings generally, just because they allege sexual abuse. The fact that young offenders may be targeted for abuse because of their vulnerability, and because they are less likely to be believed, does not mean that their institutional history for deceit or criminality should be discarded in evaluating their credibility. The fact that abused young offenders may be reticent to report their victimization while in an institutional setting should be considered in assessing the importance, or lack thereof, of an untimely complaint, as should the fact that their complaints may only have been forthcoming after the Government created expectations of compensation for abuse.

Much of this was lost upon those who designed the Government's response and who negotiated the Compensation Program. Perhaps this is explained, in part, by the undeniable fact that young people had been abused by MacDougall and others within the Province's institutions. It might also be explained by the revelations of institutional abuse in other provinces. There is no doubt that Paula Simon, who came to the program as Director of Victim Services, was predisposed by her background and training to accept allegations of abuse as valid. The Reports of Mr. Stratton and Ms. Samuels-Stewart contributed to the problem. As well, in fairness, it must be noted that even a number of IIU investigators, who later came to regard the majority of claims as false, believed

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[70] *Ibid.* at p. 273

during this critical period of January to May 1996, that the vast majority of claims were true.[71] *For these and other reasons, some of those who designed the Government's response and negotiated the Compensation Program assumed uncritically that those who would claim they had been abused, were abused. It was thought that one could predict the likely percentage of false claims – expected to be minute in number – as some sort of objective fact,*[72] *as if the design of any program that invited claimants to come forward was irrelevant to how many false claims would be generated. As a result, verification assumed little or no importance in the design of the Compensation Program. In turn, I am convinced that the unimportance of verification created a climate conducive to false and exaggerated claims to being made.*

It is instructive that even the claimants who met with me recognized the obligation to verify abuse claims, to separate out true and false claims, and provide alleged abusers with an opportunity to respond. As I earlier noted, their counsel urged the Government to adopt a more stringent verification process, albeit out of concern that valid claims would otherwise be discarded.

There was a second fundamental error revealed in the Government's negotiations respecting the MOU. Government officials assumed that only an ADR process which sheltered claimants from a critical evaluation of their claims – even to the point of excluding employees from any meaningful participation – could accommodate the concerns of true victims of abuse. Cabinet was effectively asked to choose between not accommodating victims by forcing them to pursue traditional litigation and accommodating victims through a user-friendly ADR process. It is a serious mistake to assume that neither traditional litigation nor arbitration can accommodate the needs of true victims of abuse. To a greater or lesser extent, both can.

Furthermore, an alternative process such as a compensation program can even better accommodate the needs of true victims of abuse in a way that is compatible with the need to discover the truth and to accommodate the rights of those accused to defend themselves. This was not understood. Instead, out of concern for the needs of true victims, the Government was prepared to

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[71] In the internal memorandum from the IIU investigators to Mr. Barss of March 27, 1996, after conducting approximately 35 interviews of claimants, the only investigative concern raised by the investigators was the volume of documentation. In our discussions with Staff Sgt. Frank Chambers he described that in this early time period, Government workers whom he encountered presumed the guilt of former and current employees. They felt it was simply a matter of going through the formalities. Chambers did not think he got caught up in that mind set; he wanted to see how the evidence bore up to scrutiny. He said it was hard to believe that these people had all come forward if the complaints were not true, but if true, it was also hard to believe that they had not surfaced before.

[72] In a number of interviews by my staff with both claimants' counsel and Government negotiators, there were varying recollections as to the likely percentage of fraud – 3%, 5% or 10% – that would be regarded as tolerable by the Government.

jettison components of programs in Ontario, already victim-sensitive, to better serve the victims' needs. In so doing, it failed to appreciate that those components were sometimes designed to better ensure the integrity of the process.

I will later address how the needs of true victims can be accommodated in ways that nonetheless remain consistent with the obligation of Government to ensure that the compensation process is credible and fair. There is no doubt that true victims can be better accommodated as one moves away from formal litigation and towards private arbitrations and specially designed compensation programs. The parties can craft their own rules to appropriately balance the interests of affected parties. For example, the parties may agree that the fact-finding remains confidential, an important consideration for complainants who would otherwise risk public exposure as former offenders.

Of course, in some respects, that is what the Government negotiators thought they were doing in designing and implementing the Compensation Program: moving to an ADR process that sensitively served the interests of the complainants and prevented their potential re-victimization through traditional litigation. However, fundamental in any balancing of the interests of both claimants and adverse parties, is a recognition that the process must resolve disputed facts in a way that is credible and fair.

In our interviews with Government officials the view was expressed that employees did not need not be involved in the design of the Compensation Program. Their point was that the decision to compensate individual claimants was made without prejudice to the employees implicated as abusers. Settlements and file review decisions were confidential and were not legally binding upon employees. Employees were required to make no financial contribution to the process. They would benefit from the fullest of legal and constitutional protections, should they have to defend themselves in criminal, civil or disciplinary proceedings. Accordingly, it was said, employees were not in any way prejudiced by the process.

As will be developed elsewhere, there are serious difficulties with the view that employees were not prejudiced by this process. The very public apology offered up by Government on May 3, 1996, followed by the compensation of many hundreds of claimants, and the reassignment or suspension of staff, sent a very clear message, particularly in small communities, that the guilt of many employees had been decided.

But leaving aside prejudice to employees for a moment, in my view, adoption of a process that did not credibly evaluate the legitimacy of individual abuse claims undermined the integrity of *the process itself. It violated Government's moral and fiscal responsibility to the public. Arguably, it also violated Government's duty of care towards its own employees. And ultimately, it harmed those true victims of abuse whose victimization is now uncertain in the minds of the public.*

The March 8, 1996, memorandum submitted to Cabinet presented two alternatives to continuing with the ADR process: making payments over time, at an expected cost of $50.63 million, or litigating, at an expected cost of $61.1 to $66 million over five years. They were presented as more costly and lengthy than ADR. But were they? The numbers associated with the option to litigate assumed that 450 of the 500 anticipated claimants (90%) would pursue litigation. The numbers also assumed that 100 cases would be fully litigated, with in-house counsel legal services costing $145,000 and damage awards ranging from $88,000 to $102,000 per case. It was assumed that the remaining 350 cases would settle within the same range. Added to the cost of this option were estimates for a public inquiry. I recognize the difficulties in accurately predicting the costs of litigation. However, the available documentation did not reasonably justify an estimate of $145,000 for in-house legal services, or that 90% of claimants would pursue litigation. For example, the assumption had been in July 1995 that only 50% of claimants would pursue litigation. This is not to say that the ADR process, with a fair and accurate verification process, should not have been pursued. Rather, it is to say that the memorandum virtually made continuation of the ADR process the only sensible option.

Cabinet approved the continuation of the process, with an anticipated budget of $33.3 million, on March 21, 1996. There is no indication that the above issues – the appropriateness of a process that minimally verified claims, that excluded employees from any role in a verification process, that did not require statements under oath – were raised with Cabinet.

The MOU was finalized within a short time of Cabinet's approval. Indeed, the entire negotiations spanned only seven meetings and approximately three months. It is interesting that Cabinet's earlier approval in July 1995 had contemplated a year-long negotiation process, even when it was expected that the negotiations would take place with one or two advocacy groups representing all claimants. Despite internal and external pressures, it is difficult to see why the Government felt compelled to conclude the negotiations so hastily.

As detailed in Chapter VIII, the IIU and RCMP investigations were underway. Even at the earliest stages, the enormous investigative task was apparent. Mr. Stratton's investigators told my staff that time had not permitted them to look for or obtain medical records, speak to medical personnel or even obtain records to confirm the presence of complainant and employee in the institution at the same time. New documentation was being uncovered. By December 1995, the IIU *had uncovered well over 1,000 files which had not been available to the Stratton investigation. The RCMP had assembled a task force, which suggested there were volumes of documentary material, requiring major case management. By March 7, 1996, nine investigators were committed to the task. Potential claimants were being identified.*

In my view, as the number of claimants escalated to a level not previously contemplated (at least by the Government), it was important that decisions as to the scope and nature of the Compensation Program be based upon adequate information. In this context, this meant that, at the very least, the Government should have structured a process that permitted it to determine the number of eligible claimants prior to concluding the MOU. Alternatively, as was done in Grandview, the Government could have closed eligibility to the program, while recognizing that later claims might still be dealt with, but not necessarily in the same way. Or, the Government could have decided to defer resolution of claims not already validated through the criminal process until criminal and/or disciplinary proceedings had been completed. No doubt, it would have been contended that true victims would be harmed by these approaches, and that any such measure would have driven claimants to litigate. Be that as it may, a Government response with true credibility may have compelled such an approach. Such measures, if adopted, would also have ensured that it was unnecessary to change the existing program mid-stream, causing individuals whose claims had not been processed and who had truly been abused, to feel, with complete justification, that they had been betrayed and unfairly treated.

VII

The Memorandum of Understanding

1. INTRODUCTION

This chapter summarizes the Memorandum of Understanding ("MOU") that initially served as the framework for the Compensation Program. The full MOU is reproduced as Appendix "F".

The MOU covered the three institutions at which the Stratton Report found that abuse had occurred: the Nova School for Boys (Shelburne Youth Centre), the Nova Scotia School for Girls (the Nova Scotia Residential Centre) and the Nova Scotia Youth Training Centre. It provided compensation for established survivors[73] of physical or sexual abuse at those institutions.

The MOU stated that survivors, through their legal representatives, "resolved a process and parameters for compensation" for the physical and sexual abuse they experienced. It specified that neither its terms nor the process leading to its creation constituted any admission of liability on the part of the Province. Indeed, the parties specifically agreed that the MOU would not be introduced as evidence in any existing or future legal proceedings.

The MOU listed the following as the fundamental purposes of the compensation process:

- To acknowledge moral responsibility for the Physical and Sexual Abuse experienced by the Survivors which was perpetrated, condoned, or directed by employees of the Province during the time the Survivors were resident in the Institutions;

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[73] The MOU utilized the term "survivor" throughout, defined as an individual who alleged that he or she was a victim of physical and/or sexual abuse. The term "claimant" was substituted in the later Compensation for Institutional Abuse Program Guidelines ("Guidelines"), released November 6, 1997. Here, the term "survivor" is used when reproducing the language contained in the MOU. Elsewhere, I comment on its use in the MOU.

- to affirm the essential worth and dignity of all of the Survivors, who were residents of the Institutions;
- to assist the Survivors, in a tangible way, with the healing process;
- to affirm to the Survivors that they were not responsible in any way for the Physical and Sexual Abuse perpetrated, condoned, or directed by employees of the Province while the Survivors were resident in the institutions; and
- to implement financial compensation and other benefits to Survivors in a principled, respectful and timely fashion.

2. ELIGIBILITY

Survivors were eligible for the compensation and other benefits identified in the MOU where it was established, through negotiation or file review, that physical and/or sexual abuse had occurred. Survivors whose claims were validated were to be compensated for abuse perpetrated, condoned, or directed by employees of the Province during the time the survivors were resident in the named institutions.

"Physical abuse" was defined to mean any act of physical assault which was a violation of the provisions of the *Criminal Code*, as that legislation existed at the time the act took place.

"Sexual abuse" was defined to mean:

(i) acts of oral, vaginal or anal intercourse; masturbation; fondling; digital penetration; and acts of sexual interference, which may include inappropriate watching or staring, comments and sexual intimidation; and includes any sexual act which was a violation of the *Criminal Code*, as that legislation existed at the time the act took place; and/or

(ii) attempted acts of oral, vaginal or anal intercourse; masturbation, fondling, or digital penetration, which were a violation of the *Criminal Code*, as that legislation existed at the time the act took place.

3. COMPENSATION CATEGORIES

Schedule "B" to the MOU established compensation categories and counselling allotments as follows:

Categories	Description	Range of Awards	Counselling Allotments
Category 1	Severe Sexual and Severe Physical	$100,000-$120,000	$10,000
Category 2	Severe Sexual and Medium Physical Severe Physical and Medium Sexual	$80,000-$100,000	$10,000
Category 3	Severe Sexual and Minor Physical Severe Physical and Minor Sexual	$60,000-$80,000	$10,000
Category 4	Severe Sexual	$50,000-$60,000	$10,000
Category 5	Severe Physical	$25,000-$60,000	$10,000
Category 6	Medium Physical and Medium Sexual	$50,000-$60,000	$7,500
Category 7	Minor Sexual and Medium Physical Minor Physical and Medium Sexual	$40,000-$50,000	$7,500
Category 8	Medium Sexual	$30,000-$50,000	$7,500
Category 9	Minor Sexual and Minor Physical	$20,000-$30,000	$5,000
Category 10	Medium Physical	$5,000-$25,000	$5,000
Category 11	Minor Sexual	$5,000-$30,000	$5,000
Category 12	Minor Physical and/or Sexual Interference	$0-$5,000	$5,000

Schedule "C" to the MOU provided guidelines as to the type and frequency of abuse that would merit inclusion in each compensation category. It read in part:

> The number of incidents may not be determinative of category, but may offer guidance to determine category. Cases shall be evaluated in the context of Statements available for review. After determining which category a Survivor shall be placed in, a file reviewer shall consider any aggravating factors present and may, on the basis of the aggravating factors, move the Survivor up within the range of that category. The absence of aggravating factors in any particular situation shall not preclude a Survivor from being placed at the top of a category range.
>
> For purposes of clarity, any act which constituted sexual assault or attempted sexual assault under the *Criminal Code*, as it existed at the time of the act, as well as sexual interference as outlined herein, shall be considered to be Sexual Abuse. (Emphasis in the original.)

An example of the contents of the schedule is provided below:

SEVERE SEXUAL

Type of abuse:

- anal intercourse
- vaginal intercourse
- oral intercourse

Duration/Number of Incidents:

- repeated, persistent, characterized as "chronic", "severe"

Aggravating Factors:

- verbal abuse
- withholding treatment
- long-term solitary confinement
- racist acts
- threats
- intimidation

No monetary compensation was available for any psychological consequences of the abuse.

4. PROCESS

Compensation was to be determined by reference to written signed statements of the survivor. These statements had to have been taken by Mr. Stratton's investigators (Facts-Probe Inc.), the Internal Investigations Unit ("IIU") or a police agency.[74] At the option of either the survivor or the Province, medical records of any of the institutions at issue could also be considered. Reference could be made to medical reports prepared for the purpose of establishing physical abuse, physical injury or physical disability where no other independent records existed.

Survivors were entitled to access any of their statements taken by Facts-Probe Inc. or the IIU. They were also entitled to access any other statement with the prior consent of its author, as well as any medical, educational, social work or probation files kept or maintained by the institutions "in respect of the survivor personally and not related to others."

Disputes respecting the truth of the allegations of abuse or the quantum of compensation were to be resolved either through negotiation (with an official called an "assessor") or, failing resolution, through a file review process.

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[74] Statements given by a survivor and reduced to writing or recorded on audiotape or videotape with a view to validating a claim could not be released to the public without the survivor's prior written consent.

A survivor was required to make a Demand upon the Province. The Province then had to respond within 45 days. If the demand was accepted, then payment in full had to be made within 20 days of acceptance, and in any event not later than 65 days from the date of the Demand, upon receipt by the Province of a release signed by the survivor.

The release had to be in the form attached as Schedule "D" to the MOU. The form reflected that the survivor understood that the provision of any benefit under the MOU was made without any admission that the Province or its agents were negligent, in breach of any duty, or in any way responsible for the survivor's injuries or damages, and that liability was denied. The Province and its present and former agents who were involved in the administration of the institutions were also fully released from potential civil actions. The survivor was still entitled to sue any employee who committed abuse against him or her.

If a negotiated agreement was not reached within 45 days of the Demand or such further time as could be agreed upon, the survivor could continue to negotiate with the Province or give notice that the Demand will be submitted to file review.

5. FILE REVIEW

The MOU stated that the list of file reviewers had been chosen by the survivors and accepted by the Province. The list was attached to the MOU as Schedule "A".

A survivor was to choose his or her file reviewer from Schedule "A". The choice could only be rejected by the Province for a conflict of interest.

The survivor's Demand was to be submitted to the file reviewer, with a copy to the Province. The Province then had 20 days to forward its Response to the file reviewer.

Subject to the file reviewer's availability, file review was to take place within 30 days of the submission of the Demand. (Non-availability could result in the choice of another reviewer.) The chosen file reviewer could not adjourn or recess a proceeding beyond the prescribed time limits without the consent of both parties.

The survivor was entitled, upon request, to appear personally or by videotape, audiotape or telephone before the file reviewer. If the survivor appeared without counsel, no other party could appear before the file reviewer. If the survivor appeared with counsel to make representations, the Province could appear and do likewise.

The MOU contemplated that a survivor could make allegations not already contained in his or her statement. Where this occurred, the survivor had to choose to either adjourn the file review immediately and make a further statement and Demand (in which event the survivor was responsible for his or her legal costs from the date of adjournment), or permit the reviewer to disregard the new allegations when deciding how much compensation should be paid.

The survivors (as a group) and the Province were each to select interview statements taken by Facts-Probe Inc. which they regarded as representative of each category of compensation (up to four per category). These "Statement Volumes" were to be provided to file reviewers, without names and dates. The file reviewer was directed to take them into consideration when determining the amount of compensation.

The file reviewer was to render a written decision to the survivor and the Province within 30 days of either the Province's submission or the appearance before the file reviewer, whichever was later. One hundred dollars was to be deducted from the reviewer's fee for every day the decision was late. The decision had to accord with the guidelines in Schedule "C" and it could not exceed the monetary limits contained in Schedule "B". The MOU stipulated that the decision was final and not subject to appeal or judicial review.

Compensation awards were to be paid within 20 days of the decision to the survivor's lawyer, in trust, upon the Province's receipt of a written direction to pay signed by the survivor. The money was deemed not to be income for purposes of Nova Scotia law.[75] The Province also undertook to request that other jurisdictions enact reciprocating policies or legislation. (A number of the claimants were no longer residents of Nova Scotia.)

The Province undertook to treat all survivor information it held or received in respect of a claim for compensation in accordance with its *Freedom of Information and Protection of Privacy Act* ("FOIPOP") obligations.

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[75] On June 18, 1996, amendments were approved by Cabinet to the Regulations under *The Family Benefits Act* and *The Social Assistance Act* to provide that the compensation payments under the MOU were not income for the purpose of determining family benefits or social assistance.

6. COUNSELLING AND OTHER BENEFITS

Interim counselling had been available since July 20, 1995, to a maximum of the earlier of one year's counselling or $5,000. The survivor was entitled to continue interim counselling until compensation was payable, a file reviewer determined that no compensation was payable or the survivor chose to proceed against the Province civilly. A survivor was entitled to long term counselling in accordance with Schedule "B", once compensation became due. At that point, interim counselling was terminated. The long-term counselling allotment could be applied to the cost of employment, psychological or financial counselling. Any portion of the value of psychological counselling could be transferred to a survivor's "spousal partner" or children. The Province was entitled to require that counsellors be accredited in accordance with the Province's earlier agreement to provide interim counselling.

The Province was to provide survivors and/or their counsel with a list of drug dependency programs available in Nova Scotia. As well, the Province had to facilitate and fund the preparation by an independent recorder of a public report of survivors' testimonials.[76]

7. LEGAL FEES

Legal fees incurred by survivors, and disbursements and counsel's travel time and expenses, were to be paid by the Province in accordance with rates established in the MOU. Senior counsel (10+ years' practice) were to receive their usual hourly rate to a maximum of $175 per hour; intermediate counsel (5 to 9 years' practice) to a maximum of $150 per hour; junior counsel to a maximum of $125 per hour; and articled clerks to a maximum of $75 per hour. These hourly rates were to include time spent by counsel's office staff.

Such legal fees, travel and disbursements could include those incurred:

- in connection with discussions to develop the MOU;
- in furtherance of a particular survivor's civil case (other than relating to media interviews or lobbying for a public inquiry) from the date counsel was retained to the signing date of the MOU, if it was determined that compensation was payable to the survivor; and

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[76] This report has yet to be prepared.

- on behalf of a survivor after the signing date of the MOU, not to exceed 10 hours' representation.

Once a survivor has signed a Schedule "D" release, all contingency fee agreements previously entered into between counsel and a solicitor were revoked and no further such arrangements were to be entered into respecting compensation payable under the MOU.

8. ADDITIONAL PROVISIONS

Entitlement to the lawful heirs/estate of a survivor who had died was established.

The Minister of Justice, on behalf of the Province, within 30 days of the effective date of the MOU, had to convey a public apology to the survivors and their families for the physical and sexual abuse that the survivors experienced while resident in the institutions. Following the settlement of any individual claim, the Minister was also, by personal letter to the survivor, to convey an apology to that survivor.

At his or her option, a survivor who was entitled to compensation could have all or part of that compensation paid by way of structured settlement.

To be eligible for compensation, a survivor, within six months of the effective date of the MOU, had to give written notice of his or her intention to make a Demand upon the Province. Such a demand had to be submitted within six months of such notice.

9. ANALYSIS

I take issue with a number of the MOU's provisions. Some are inconsistent with a meaningful validation of claims. The time lines within which the Province was to respond to an initial Demand, and respond to a submission to file review, not only reflected Government's disinterest in true validation, but also ensured that it could not take place.

The MOU articulated no explicit burden of proof. It identified the parties to appear before a file reviewer, and the "Statement Volumes" to be available to the reviewer to quantify damages, but otherwise was largely silent as to the procedures at the review. There was certainly no suggestion that the file reviewer would hear from employees or others adverse in interest to the *claimants. Indeed, not even Government counsel were entitled to attend a file review pertaining to an unrepresented claimant. As for as documentary evidence, the MOU reflected that compensation would be determined by reference to written statements taken by the Stratton investigators, the IIU or a police agency and, at the option of either party, the institution's medical records. Certain medical reports could also be resorted to in certain circumstances. At best, the MOU was mostly silent as to the documents and witnesses that could be relied upon in determining a disputed claim. However, it could also be interpreted – as it was – to significantly limit resort to any materials other than those explicitly mentioned.*

In my view, the gaps in the MOU pertaining to validation supported the apparent understanding of claimants' counsel (based on communications from the Government negotiators) that little or no verification would be required. As we will see, conflicting views soon surfaced as to how claims should or should not be validated.

I will defer consideration of other provisions in the MOU until later in the Report, when I discuss changes made to the program.

VIII

The Commencement of Investigations

1. INTRODUCTION

Chapter VI outlined the process from July 1995 to May 1996 which led to the creation of the Memorandum of Understanding ("MOU"). When the Minister of Justice announced at the July 20, 1995, press conference that the Government had approved an ADR process to compensate abuse victims, he also stated that an internal investigation was underway that would determine whether any current provincial employees should be subject to disciplinary action. As previously noted, he said that this examination would reach beyond those who may have perpetrated abuse: the actions or lack of action of those who could, or should, have had knowledge of such abuse was also under investigation. He also announced that the Stratton Report, which had identified criminal activities, had been turned over to the RCMP for appropriate action. He cautioned, however, that the RCMP would only approach those victims who consented to being contacted by the police.

Accordingly, during the period leading up to the negotiation of the MOU, the Internal Investigations Unit ("IIU") was formed and commenced operations, and the RCMP initiated an investigation. As part of the investigative process, the Murphys (who had first been engaged by Mr. Stratton) were re-engaged by the Government. This chapter of the Report examines these developments.

2. FORMATION OF THE INTERNAL INVESTIGATIONS UNIT

One week before the press conference of July 20, 1995, Paula Simon informed the Deputy Minister of Justice, D. William MacDonald, Q.C., that she had just learned there were five men on staff at Shelburne who had been identified by Mr. Stratton as perpetrators of physical abuse. It was her advice that the Government should take decisive action and release them from their duties.

On July 18, 1995, Fred Honsberger, Acting Executive Director of Correctional Services, wrote to the Deputy Minister, endorsing an investigation of current staff members at Shelburne who were identified to Mr. Stratton. In Mr. Honsberger's view, the investigative and disciplinary process should be geared towards punishing abusers and protecting young people against further abuse. However, he cautioned that the alleged perpetrators must be informed of the specific allegations against them and that action should not be taken against staff based upon general, unconfirmed allegations. He noted that the three-part response chosen by the Government was inherently victim-oriented, unlike a public inquiry which would focus on wrongdoing. Mr. Honsberger made the following point:

> Existing allegations of abuse were made by individuals who understood that the information was being provided, in confidence, for the purpose of obtaining support for emotional problems and financial compensation. I do not believe that the information was provided with the intent of facing accusers. However legitimate the allegations may appear on the surface, the accusers should be questioned further regarding the intent of Government to use their information to take corrective action against the abusers.

Given these considerations, Mr. Honsberger recommended to the Deputy Minister that the Minister should announce that an investigation was underway, but not give details about it until the Department of Justice ("Justice") could gather more information on its likely scope. He further suggested that the investigation should be conducted by experienced investigators who were unconnected with Correctional Services. He even suggested that it may be appropriate to consider some form of a modified inquiry as an alternative to an investigation, depending on the anticipated scope of the review. This memorandum was the first document that began to outline the make-up of what eventually became the IIU.

Alison Scott, a lawyer with Justice, had acted as the main liaison between the Department and the Stratton investigation. After the release of the Stratton Report, she had asked the Murphys to provide the Department with a list of employees who had been named as abusers. The difficulty was that the identity of the named abusers was of limited assistance, absent information as to the identity of their alleged victims, and the Stratton investigators had made a promise of confidentiality to the former residents concerning their statements. Scott accordingly asked the Murphys to seek permission from the former residents to release their names to the RCMP and to Government officials. This would allow the RCMP to conduct a criminal investigation into their claims of abuse. It would also allow the Province to investigate allegations against current employees to decide whether disciplinary action was warranted, and to determine whether the names of any current or past employees should be placed on the Child Abuse Register.

On July 31, 1995, Duane Murphy provided Scott with the list of current and former employees who had been identified as abusers to Mr. Stratton. He also confirmed that Facts-Probe Inc. would endeavour to contact all complainants to determine if they would cooperate with the Department for disciplinary purposes and forego their promised right of confidentiality with respect to a criminal investigation.

Ms. Scott provided a consent form to the Murphys for their use:

> I, ____________________, of ____________________, in the Province of ____________________, hereby consent to the release of my name and any information given by me in the course of the Stratton investigation, or in the course of a follow-up to this investigation, of abuse in provincial institutions to:
>
> Check one, two or all three:
>
> [ ] 1. The Province of Nova Scotia
>
> [ ] 2. The Royal Canadian Mounted Police, or other appropriate police force.
>
> [ ] 3. To determine whether the allegation of abuse can be investigated by a relevant Children's Aid Society or the Province for the purpose of entering the abuser's name in the Child Abuse Register.
>
> DATED this ___________ day of _______________, 1995.
>
> ________________________ ________________________
>
> Witness Signature

On August 15, 1995, Scott reported to the Minister of Justice on the follow-up to the Stratton Report. She advised him of her instructions to the Murphys, noting that they were to give priority to contacting those individuals who had made allegations against current employees. She also advised that she had directed the Murphys to follow up the new complaints which had come forward since the Report was published.

The Murphys eventually contacted the Stratton complainants with a view to obtaining the requested consent. Some gave their consent; others did not.

In September 1995, the IIU was formed to conduct an investigation respecting current employees alleged to have committed physical or sexual abuse at Shelburne, as well as those who may or should have had knowledge of such abuse. The Deputy Minister of Justice circulated a memorandum within the Government, requesting that the IIU investigators be provided with the same access to Provincial files, records, information, facilities, premises and personnel that he himself would be given.

The IIU was headed by Robert Barss, Executive Director of Policing Services. In addition to Barss, there were three investigators: Dennis Kelly, David Camp and David Horner. Camp left after a month and was replaced in early November 1995 by Frank Chambers.

In a press release dated October 17, 1995, the Minister of Justice disclosed that there were then 60 allegations by 25 complainants of physical abuse by a number of current employees. It was stated that, "[s]hould the IIU uncover anything criminal in nature, the files will be turned over to the RCMP." The Minister also announced that files relating to the investigation were being collected and that several hundred had been secured. It was expected the IIU investigation would take a few months.

3. OPERATION OF THE INTERNAL INVESTIGATIONS UNIT

On October 12 and 13, 1995, IIU investigators met with some Shelburne employees and gave them written notices that allegations had been made against them. These notices included the name of the accuser and the time frame of the alleged assault. At that point in time, all allegations against current employees involved physical, not sexual, abuse.

On October 18, 1995, Mr. Honsberger sought direction from the Deputy Minister on the procedure that should follow service of notices of allegations. Honsberger suggested that employees should either remain on the job, be redeployed, or be directed to stay at home with pay, pending the completion of the investigation. The choice would depend on the nature of the allegations and the surrounding circumstances.[77]

By memorandum dated October 25, 1995, Mr. Honsberger confirmed for the Deputy Minister that the IIU investigation was to:

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[77] I never saw any documentation from the Deputy Minister specifically indicating whether he agreed with Mr. Honsberger's suggestions. However, given the subsequent memorandum from Honsberger, outlined next in the text, I assume he did.

- Provide for the safety of young offenders held at Shelburne now and in the future by assessing the potential for physical abuse by existing staff who have been named as perpetrators.[78]

- Determine whether existing staff should be removed from the facility or re-deployed pending the investigation for safety purposes.[79]

- Gather evidence of abuse perpetrated by current employees for consideration in disciplinary proceedings.

- Determine whether supervisory staff at the time of the alleged incidents of sexual or physical abuse had knowledge of the abuse. If they had knowledge, what did they do? If they did not know, why did they not know?

- Gather evidence of unprofessional conduct by supervisors or management staff for consideration in disciplinary proceedings.

- Determine what administrative action is required to prevent abuse in future.

Honsberger stated that the investigative team was in the process of determining the location, type and extent of "material, documentation and potential witnesses that may be required for evidence." Priority was being given to "allegations against existing staff."[80] The Nova Scotia Government Employees Union ("NSGEU") had been notified of the process that was being followed.

Honsberger added that there were nine current staff members at Shelburne who were facing allegations from 25 former Shelburne residents. Correctional Services administrative staff had reviewed the details of the allegations against each employee to determine:

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[78] The IIU's mandate was expanded slightly by Mr. Honsberger on November 15, 1995, to refer to assessing the potential for "abuse" by existing staff, and not just "physical abuse".

[79] On November 15, 1995, it was made clear that the IIU would simply gather evidence to permit the Departments of Justice and Community Services – not the IIU – to make this determination.

[80] The reference to priority being given to allegations against existing staff may be somewhat confusing since the IIU was formed solely for the purpose of scrutinizing allegations against current staff. My staff spoke to Mr. Honsberger about this. He advised that by "existing staff" he was referring to employees in the institutions who were still assigned to deal with children, as opposed to employees in managerial-type positions or who had been sent home or re-assigned.

- whether the allegations were of sufficient severity to suggest that existing residents of Shelburne would be in danger if the employee continued to work in his or her current capacity pending the investigation;

- whether the nature of the allegations suggested that the employee should be reassigned in a manner that would prevent the employee from having contact with residents pending the investigation;

- whether the employee should be asked to remain away from the workplace, with pay, pending the investigation.

Early on, the IIU sought access to the materials generated by the Stratton investigation.

On November 7, 1995, Harry and Duane Murphy wrote to Ms. Scott as follows:[81]

> During our conversation, Mr. Horner [one of the IIU investigators] told me that they had been in touch with Judge Stratton with regard to their desire to review the material accumulated during his investigation, which is now stored at 5151 Terminal Road. He said that Judge Stratton told them he didn't see a problem with this. Mr. Horner also stated that they talked to you and you didn't have a problem with them reviewing the material either. He then asked me if there was anything contained in the boxes of materials which would be of interest to them. I told him I would review our document list and I would advise them accordingly.
>
> I informed Mr. Horner that you, Duane and I discussed the materials stored at 5151 Terminal Road. I told him that you gave us explicit instructions not to release any statements from Judge Stratton's investigation to anyone without [the] benefit of a Release Form.
>
> .....
>
> We will take this opportunity to raise the issue of the confidential nature of Judge Stratton's investigation, bearing in mind that we not only interviewed victims, but we also interviewed abusers. (Emphasis in the original.)

Access to these materials remained a contentious issue both for the IIU and the RCMP for years thereafter. A May 28, 1997 request by file assessors for the code used by Mr. Stratton to refer to complainants and counsellors was declined. On January 5, 1999, Frank Chambers of the IIU also requested access to the Stratton materials and, in particular, to the code used in the Stratton Report.

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[81] While the text of the letter might lead the reader to believe that it was only from Harry Murphy, both he and his son signed it.

This request was also declined. Justice officials informed Chambers that they did not know the code and that instructions from Mr. Stratton were that this was to be kept confidential. The view was expressed that the Department was bound to honour Mr. Stratton's assurances of confidentiality. Later requests were again declined. Access to the Stratton materials by the Halifax Regional Police Service was obtained through the execution of a search warrant in the Cesar Lalo investigation, but was restricted to those materials pertaining to Lalo.[82] More recently, RCMP investigators (pursuant to Operation Hope) executed a search warrant and thereby finally obtained access to the Stratton materials.

At an early stage of the IIU operations, concerns were raised about the difficulties caused by simultaneous investigations by the police and the IIU. On November 3, 1995, Chief Superintendent Dwight Bishop, the officer in charge of criminal operations for the RCMP, wrote to Mr. Barss expressing his continued concern regarding the disciplinary investigation being conducted by the IIU at the same time the RCMP were conducting a criminal investigation. He felt that the parallel investigations could, albeit unintentionally, cause or be perceived to cause an abuse of process. He requested that Barss identify who the IIU investigators would be interviewing and document the instructions and precautions that had been established to ensure the criminal investigation was not tainted. He also informed Barss that RCMP investigators throughout the Province were preparing to interview all known victims, witnesses and offenders.

Bishop wrote to Ms. Scott on November 8, 1995, advising that the RCMP had selected four investigators from different parts of the Province, and that he would try to meet with them on November 20, 1995, to formally begin the investigation. He also advised Scott that, despite assurances from Barss that the IIU investigation would not interfere with the criminal process, he still had concerns.

The Justice Coordinating Committee[83] met on November 10, 1995. In a memorandum dated November 16, 1995, Douglas Keefe, Executive Director, Legal Services, summarized to Mr. Barss the discussions which had occurred.

The Committee decided that if the IIU found evidence of sexual abuse, it was to be turned over immediately to the appropriate police department. The IIU would continue its investigation only if that could be done without compromising the police investigation. The IIU was to meet with the relevant police forces to establish protocols for turning over information and continuing the internal investigation. Evidence of physical abuse would also be turned over to the police, and the internal investigation would continue.

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[82] Access was also obtained by the Province's insurers, following an Order for Production under civil procedure rule 20.06 in the litigation by the Province against its insurers: *A.G.N.S. v. Royal and Sun Alliance Insurance Company et al.* (2000), 190 N.S.R. (2d) 208.

[83] A committee of senior managers of the Department.

The memorandum described "a potentially serious and unresolved problem:"

> [T]hrough the efforts of Factsprobe (sic) and now the internal investigation unit, statements have been obtained from former residents that the former residents have directed not be turned over to the police. Potentially we have information regarding the commission of offences which in the normal course of affairs we would turn over to the police but now are honour bound not to. The RCMP may have indicated that they would not ask for information given in confidence to the Stratton Investigation by former residents. This would have to be confirmed and it will also have to be confirmed whether this extends to statements given by former residents to the internal investigation unit. This is a matter that should be worked out in a protocol between the internal investigation unit and the relevant police forces.

Mr. Keefe noted that there were five interests that were potentially competing, but which should be independent of each other, though coordinated:

1. Safety of residents;
2. discipline of misbehaving employees;
3. criminal investigation/prosecution;
4. civil liability;
5. compensation for victims through ADR.

Also discussed at the Justice Coordinating Committee's meeting was the request by the Department of Community Services ("DCS") for the IIU to conduct an investigation against current and former employees of DCS facilities. (This request was later refined to extend to current DCS employees only.)

In a memorandum dated November 24, 1995, the three IIU investigators reported to Mr. Barss that, several days earlier, they had gone to Shelburne and served the remaining notices of allegations against current employees. During this visit, they learned that there might be file records on site that were not previously known to the Department of Justice. They subsequently recovered at least 800 institutional files, as well as 45 or more files from the Shelburne Academic Centre. The investigators further reported that, on November 23, 1995, they had recovered approximately 450 files, photographs and other related items of evidence from the Nova Scotia Residential Centre in Truro. They indicated that a second visit would be required as they believed that other relevant documents existed but had not yet been found.

On December 6, 1995, the IIU investigators reported to Barss that, as of that date, they were investigating physical abuse allegedly committed by 18 current Government employees on over 147 individuals. These employees had been served with notices of disciplinary misconduct. In addition, the IIU had served notifications of disciplinary default[84] against five managers or supervisors.

In mid-December 1995, IIU investigators sought interviews with current employees facing allegations. At least some of the employees retained counsel. The position was commonly advanced on their behalf that statements would not be given until they were provided with the substance of the complaints made against them. For example, on January 5, 1996, Raymond Jacquard wrote to the IIU on behalf of nine employees, explaining that his clients were unaware of the substance of the allegations. They regarded it as only fair that this information be provided before they gave statements. Accordingly, he had advised his clients not to give any statements until this was done.

On January 4, 1996, the first disciplinary investigation was completed. The employee was subsequently notified by Mr. Honsberger that no action would be taken; the matter was closed and the employee's file would contain no record of the allegation.

By March 27, 1996, the IIU investigators reported to Barss that they were investigating allegations of abuse made by 283 complainants against more than 40 current Government employees. Approximately 35 interviews of complainants took place between January and March 27, 1996. One current employee was interviewed in the same time frame.

In the meantime, Chief Superintendent Bishop notified the Deputy Minister that the police had adopted a major case management approach in order to properly analyze the available documentation and ensure a coordinated systemic investigation into the allegations stemming from the Stratton Report. By then, the RCMP had nine investigators and four support staff assigned to the operation. Bishop anticipated that the investigative portion of the work would be completed within two years. As reflected in an earlier chapter, as of March 7, 1996, the police had identified 410 victims and 206 suspects, and those numbers were expected to increase. Bishop reported that the RCMP investigative team had been correlating the many volumes of documents and conducting interviews with the victims. Priority was being given to those cases involving suspects who were still employed by the Province. They had implemented a protocol to ensure that information that they uncovered regarding the safety of children in jeopardy would be promptly provided to DCS.

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[84] Notice of disciplinary default were allegations pursuant to the Government of Nova Scotia Management Manual (chapter 12, ss. 4 and 4.04) that supervisors or persons in positions of authority failed to report or direct and/or exercise appropriate action for the prevention of abuse.

On April 24, 1996, Crown Attorney James Burrill wrote to Jack Buntain, Q.C., Regional Crown Attorney for the Public Prosecution Service. Burrill had been assigned in January 1996 to provide pre-charge advice to the RCMP investigation. He reported that, as of April 22, 1996, the RCMP had identified 481 individuals who had complained they were victims of physical or sexual abuse at youth facilities within the Province of Nova Scotia. Eight hundred and ninety-three persons had to be interviewed before the investigation would be complete. There were 242 suspects, 37 of whom were current employees. Mr. Burrill noted that the majority of the complaints appeared to be allegations of common assault and that the RCMP had decided that they would not lay charges in those cases.

Burrill alerted Buntain to the potential problem arising from complainants being asked to give multiple statements. The fact of multiple statements, by itself, was not considered a major concern, but the RCMP were of the view that the Murphys had not taken 'pure version' statements: they had suggested the names of offenders to the complainants.[85] Further, if the Murphys were using *their own* words to summarize information, then the potential for subsequent inconsistent statements would be high. The RCMP had reported that, upon being re-interviewed, some complainants could not understand or pronounce some of the words contained in the transcripts of their statements to the Murphys.

Burrill also raised the difficulty of disclosure. The RCMP were using a data base named "Q & A". When Burrill visited the IIU offices in February, he noted large volumes of documents in their offices and believed that no data base was in place to catalogue them.

The concerns raised by Burrill were echoed by Chief Superintendent Bishop and by Assistant Commissioner R. F. Falkingham, Commanding Officer, "H" Division, when Falkingham wrote to the Deputy Minister of Justice on May 14, 1996. The Deputy circulated the letters from Burrill and Falkingham to the IIU and to Jerry S. T. Pitzul, the Director of Public Prosecutions. He suggested a meeting with the RCMP as soon as possible to discuss these concerns. Pitzul responded shortly thereafter, suggesting that the IIU, RCMP and those responsible for the compensation investigation "meet to gain a perspective of their mandate and responsibilities and to design a process for resolving, where possible, the practical issues raised."

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[85] A 'pure version' statement invites the witness, in the most general way, to outline the relevant events in his or her own words.

The RCMP continued to express concerns (in letters dated July 17 and September 11, 1996) over the fact that separate investigations were now being conducted by the police, the IIU and the Murphys. The Minister of Justice, the Honourable Jay Abbass, announced on December 6, 1996, that a statement taking protocol would be developed for the three investigations. A joint protocol was eventually signed on April 24, 1997, by the Deputy Minister of Justice and the RCMP.

4. ANALYSIS

In July 1995, Mr. Honsberger endorsed an investigation of current staff members who had been identified to Mr. Stratton. He appropriately recognized that the employees needed to be informed of the specific allegations made against them, and that action not be taken based on general, unconfirmed allegations. He suggested an investigation to be conducted by independent, experienced investigators. Creation of the IIU followed.

The theory that current employees were to be the subject of an independent and fair investigation by experienced investigators had obvious merit, as did Mr. Honsberger's view that disciplinary action could not be grounded upon the Stratton 'findings.' The difficulty I have here is how the Government addressed the interplay between the Stratton, ADR, disciplinary and criminal proceedings.

The Government's response to reports of institutional abuse was based, in part, upon the laudable desire to prevent the re-victimization of true abuse victims that can occur when they are compelled to seek redress through formal litigation. However, complainants were potentially being exposed to multiple statement-taking sessions. The existence of a criminal investigation meant that many of them would have to provide a statement to the police. The existence of an independent IIU investigation meant that many would have to provide another statement for disciplinary proceedings. Further, if the Government was intent on moving forward at the same time with a Compensation Program, and if such a program was to be credible and fair, validation might have required that the claimants provide yet another statement, unless validation could have been merged with the disciplinary process. It is well recognized that forcing true victims to recount over and over their victimization may adversely affect their emotional well-being.

Of equal concern is the possibility that the Stratton investigators, the IIU and the RCMP may have had very different perspectives on how statements should be taken. The IIU and RCMP regarded the Murphy statements, rightly or wrongly, as flawed. It was suggested that they were not 'pure version' statements: they were suggestive and not in the words of the witness. The Murphys, *on the other hand, felt that the statements were appropriately taken and accurately captured the words and intent of the witness. It was not until December 1996 that the decision was taken to develop a statement protocol. Such a protocol was finally signed on April 24, 1997. However, it appears to have done relatively little to resolve the conflicts between the RCMP and IIU in particular.*

In my view, the Government created parallel investigations without ensuring, up front, that they would interrelate in an efficient and productive way. The parallel investigations meant, in practice, that witness interviews were uneven – at times supportive and other times adversarial – and that data was shared imperfectly, when it was shared at all.

Generally, a Government response to reports of institutional abuse should ensure, first and foremost, that a criminal investigation is not compromised and that witnesses, including victims, are not subjected to repeated and inconsistent interviews. This often means that an investigation, for disciplinary or compensation purposes, should be deferred, pending completion of the criminal investigation. My recommendations later address this issue.

IX

The Early Days

1. PREPARATIONS FOR THE MOU

The Memorandum of Understanding ("MOU") took effect on June 17, 1996. This was the official start date for the processing of claims. However, before the process could begin, a number of details had to be addressed by the Government.

The Compensation Program office was set up on the first floor of 5151 Terminal Road, Halifax, in the same building that housed the head office of the Department of Justice ("Justice"). Lawyers from Justice were assigned as file assessors: Amy Parker, Sarah Bradfield and Brian Seaman.[86] Paula Simon ran the office as Program Manager and was also fully involved in file assessments. Alison Scott continued to provide legal advice to the Program and assisted in file assessment as time permitted.

In a memorandum dated May 6, 1996, the Minister of Justice told the Priorities & Planning Committee of Cabinet ("P&P"):

> The resources to validate allegations is [sic] critical in ensuring that sufficient information is available to respond to claims for compensation in a timely fashion. The ability to do so will be important to the integrity of the compensation process.
>
> It is clear that the IIU lacks the investigative resources to meet the expectations of the compensation process. It is critical that investigators be in place as quickly as possible to deal with the volume of material, and to ensure the process is not delayed.

Four additional investigators were added to the Internal Investigations Unit ("IIU") in May 1996: David Gunn, Erol Flynn, Edwin Grandy and Wallace Bonin, all retired officers from the

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[86] Mr. Seaman initially worked part-time.

Halifax Regional Police Service. Although attached to the IIU, it is clear that they were hired to assist in the Compensation Program.

On May 17th, two weeks after the Program was announced, Robert Barss, head of the IIU and Executive Director of Policing Services, reported to the Program office that 454 individuals were expected to make claims.

As noted earlier, the MOU stated that the survivors had chosen the list of file reviewers and that the Province had accepted the list.[87] In fact, it had been agreed by counsel for the claimants and the Government, that counsel for the claimants would submit a list of 20 nominees by June 17, 1996. The Province could then remove names from the list if there was a conflict of interest. However, counsel for the claimants submitted a list of 67 names. Compensation Program staff concluded that it would be a daunting task to try to deal with 67 different potential file reviewers. They therefore reviewed the list, eliminated individuals with conflicts of interest, and, keeping in mind issues of gender, race, and geographical location, reduced the list to 28 names. They anticipated that only 20 of the 28 persons would agree to undertake the task. Eventually, 22 accepted the assignment.

Some of the claimants' counsel asserted that the Province had acted unfairly in reducing the number of file reviewers. They took the position that, given the level of distrust the claimants felt towards the Government, the reduction would be seen by claimants as an attempt by the Government to control the selection process. *With respect, it is my view that the list submitted by counsel for the claimants was somewhat unmanageable, and that the Government's determination to shorten the list was eminently reasonable, particularly given the fact that all names selected had originated with claimants' counsel.*

Inquiries were made by at least two counsel for claimants about submitting statements in lieu of those taken by the Murphys. In an e-mail to Ms. Parker, Alison Scott advised as follows:

> The Mo. [MOU] accepts one form of validation. Murphy statements. The Province is not permitted to test the statement by way of cross-examination, or to lead contradictory information from other sources, i.e. the employee alleged to have committed the abuse. The only check we have in the system is the information we can glean from the Murphy statements, and any information H & D [Harry and Duane Murphy] may be able to impart to us. The statements follow a similar format and there is consistency in the interviewers. To allow other statements in the process would undermine the minimal control the Province

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[87] As outlined in Chapter VII, file reviewers were to preside over file reviews, which were to be proceedings held when a claimant and the Province were not able to agree upon a resolution of the claimant's Demand. The file reviewer would determine whether the Demand was valid and, if so, the amount of compensation to be awarded. The file reviewer's decision was to be final and not subject to appeal.

> has in evaluating truth and credibility. Neither we, the Murphys nor the file reviewer were present when the statement was given to observe demeanour. The admission [of other statements] is prejudicial to us in that we do not have the opportunity, through the Murphy's [sic] to test any of it. In addition, the admission is inconsistent with the provision in the MOU which requires new allegations to be substantiated by a second Murphy statement, or delay the hearing. If parties intended additional information to come in other than the Murphy statement, we would not have inserted this provision. Adoption of a statement presents the same problems. While the Murphys may receive a statement from someone, unless the allegations set out in the adopted statement are found in the Murphy statement, we have no opportunity to bring the Murphy's judgment to bear on the issue of credibility. Invite him [claimant's counsel] to request a second Murphy statement if he feels that the present one is inadequate. Do not agree to have a preliminary determination of an issue. The Mo. makes no provision for it.

2. THE EARLY OPERATION OF THE MOU

The assessment of claims began in mid-June 1996. In keeping with the limitations on my mandate, I do not comment on any individual claim or Government Response. My focus will be on the process utilized in the Compensation Program.

Prior to the MOU coming into effect, Amy Parker requested from the IIU a list of all staff employed at the relevant Provincial institutions from the time the Province took them over to the present, along with the date each staff member began and ceased employment. This information was to allow the file assessors to establish whether an alleged abuser was working at an institution at the time the abuse was alleged to have occurred.

By June 14, 1996, the Program had received 20 claims for compensation. The Program office asked the IIU investigators for all the information they had on the claims being made, but the only information the investigators had, for the most part, was the dates of intake and release of the claimants and employee information at the various institutions.

The file assessors decided to have weekly team meetings to discuss claims. They wanted to achieve consistency in their approach to responding to Demands. It was also decided that the file assessors would meet once a week with the Murphys in order to obtain their input on the credibility of individual claimants. The first of the meetings with the Murphys was arranged for June 18th to discuss the 20 claims already received.

As noted before, the terms of the MOU required the Province to respond within 45 days after receipt of a Demand submitted by a claimant. Twenty claims had been submitted by mid-June; the first Responses were therefore due by August 1st. By June 21st, the Program had received 154 Demands. Four weeks later, the number had risen to 259. The sheer number of claims made it difficult for the Government to respond within the agreed upon period.

The IIU was requested to provide institutional records for each of the claims. However, the records were not computerized and the information could not be quickly accessed. For the most part, during the period from June 17th to October 31st, file assessors had little more than the dates of a claimant's intake and release from the institution, and whether or not the alleged abuser was employed at the institution while the claimant was there. Concerns were also raised by Program staff that the lists of institutional employees that had been provided to them were not complete.

The file assessors continued to try to rely on the Murphys for assessments of credibility of the claimants. They met with them on June 28th for this purpose. A further meeting was to be held on July 18th to discuss 45 claims, but our review of the documents indicates that this meeting did not take place. Amy Parker wrote to the Murphys on that date, attaching a list of 231 claimants (which included the 45 claimants who were to be the subject of the July 18th meeting). She said: "Please let me know, before August 1, 1996, if you feel any of the claimants are being less than candid and truthful."

When interviewed by members of my staff, the Murphys recalled that their instructions from the summer of 1995 were to take statements in the same manner as they had for Mr. Stratton. It was their recollection that they asked who was going to verify the statements. They advised my staff that they were told by Ms. Scott that verification was going to be done by a task force headed by Mr. Barss. The Murphys advised that they certainly did not anticipate that claims would be paid based on the statements they had taken for Mr. Stratton or on the statements taken subsequently from new claimants.[88] We could find no documentation that dealt specifically with these issues. However, there is an interim report dated October 26, 1995, by the Murphys to Scott. It reflects that the Murphys had informed Barss and the RCMP of their contacts with claimants before and after the Stratton investigation. The Murphys noted as follows:

> We have not gone beyond our Terms of Reference to seek out records of the Shelburne Youth Centre to confirm the dates the victims were admitted and released. Medical records at the Centre, or the Roseway Hospital in Shelburne, or elsewhere, if any exist, have not been reviewed. If such documents were available, they may corroborate some of the information supplied by the victims.

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[88] Details of the instructions by Ms. Scott to the Murphys are outlined in Chapter VIII.

In the course of discussions with members of my staff, the Murphys recalled being asked on occasion by members of the Compensation Program office whether or not certain claimants were telling the truth. They said their response was that they were not psychologists and could not make that determination. They told the Program office that the claimants seemed convincing, but they simply did not know if the claimants were actually being truthful.

During this period, comments about the Compensation Program were made both by counsel for claimants and counsel for current employees. In a letter dated July 10, 1996, Ms. Derrick wrote to Simon, Parker and Scott, stressing the need for the Government to be mindful of the impact that the Responses by the Province would have on claimants:

> The process of advising clients and preparing Demands has been profoundly challenging, in particular because many survivors are so deeply offended by the categorization of abuse and the guidelines under the Memorandum of Understanding. I have had numerous discussions with survivors in which survivors have expressed their views that their experiences and suffering are being demeaned and devalued by this process. These responses are heightened by the fact that the participation in the process by itself is, for many survivors, churning up hugely painful memories and the unresolved effects of the abuse. I often find myself recommending counselling to survivors not only with respect to the abuse they experienced, but also to deal with the problems they are having with this process.
>
> I am gravely concerned about the potential for this process to compound the harm already inflicted on these survivors. The process of resolving the compensation claims must be governed in this unique process by the principle of ensuring that survivors feel they are believed, respected and acknowledged. I am hopeful that the resolution offered by this process can be one that survivors experience as a reconciliation of their pain and the damage done to them previously by those in positions of trust and power.

In the meantime, Cameron McKinnon had been retained by the Nova Scotia Government Employees Union ("NSGEU") to assist current employees. He contacted Parker by telephone on July 25, 1996, and inquired whether or not any claims had yet been paid. He was advised that the Program would be making 160 offers of compensation on August 1st. McKinnon wondered how offers could be made when "the investigation is not complete because you haven't interviewed the employees to get their side of the story." He protested that it was wrong to pay out claims without speaking to the employees.

Parker advised the Deputy Minister of McKinnon's call. He responded in an e-mail to Parker that the IIU would be delighted to have the opportunity to interview staff if McKinnon would change his advice to his clients not to talk with the IIU. He also commented that it could save the Province money if they had "the other side" of the story before finalizing claims, but there was a time table for processing claims and the Compensation office could only do what was possible during that time frame.

On July 26, 1996, McKinnon wrote to Alison Scott on behalf of 23 clients. He objected strenuously to the payment of compensation before the IIU finished its investigation. He wrote:

> It has always been, and remains, my clients' position that they would co-operate with any Department of Justice investigation, provided they were given adequate disclosure to defend themselves against allegations made. Correspondence to that effect has been sent to Marion Tyson, solicitor for the Internal Investigations Unit. My clients have yet to receive adequate disclosure of any information contained in allegations against them, and therefore, through no fault of their own, have been unable to respond. There have been some people who have received no disclosure whatsoever. Therefore, your indication to me that you understood my clients were not willing to co-operate with any Department of Justice investigation is completely erroneous.
>
> Furthermore, it would seem to me to be totally contrary to the concepts of fundamental justice and due process for the Department of Justice to be giving compensation to alleged victims when the Government's own Internal Investigations Unit has not finished its investigation nor given my clients an opportunity to be fully informed prior to discussing the allegations with them.

Shortly after the Province sent out its first batch of Responses to Demands for compensation, a group of six lawyers, representing between 500 and 600 claimants, strenuously objected to how the claims were being handled by the Government. On August 9, 1996, Ms. Derrick wrote on behalf of the group to the Minister of Justice, the Honourable Jay Abbass, requesting an immediate meeting to discuss "serious problems." Derrick asserted that it was evident from the Province's Responses that the manner in which the compensation process was unfolding betrayed the principles on which it was reportedly based. She argued that, as a consequence, it was becoming a discreditable process and was inflicting additional significant injury to survivors.

Amongst other things, concern was expressed over the validation of claims. Derrick advised the Minister that she and others had been led to understand during discussions with the Government's negotiating team in February and April that the Province would not be looking at strict validation or proof of claims – what survivors said to the Murphys or other investigators would be taken as true unless the Province had something that directly contradicted the allegations. She said this was not what was occurring. In some Responses, the claimant's assertions had been dismissed as implausible. In others, claims were being partially or wholly rejected because the description by the claimant was considered by the file assessor to be "unreasonable." Further, several claims were said to have been rejected because they did not "fit the typical profile of a victim of child paedophilia."

Derrick also expressed concern that the Government's offers of compensation were being influenced by budget rather than merit. She noted that, by the end of July, over 800 survivors had come forward, although the budget of $33.5 million for the Program had been set on the basis of an anticipated 500 claimants. She suggested this was "having an influence on the way the Province [was] dealing with compensation," and urged the Minister to take the issue to Cabinet in order to ensure that the Program would have adequate funds to deliver on its undertakings.

The Minister replied on August 13th, assuring Derrick and the other lawyers that staff had been instructed to be guided by the merits of each case and not by the Program's budget.

The concerns raised in Ms. Derrick's letter of August 9th were echoed by Derrick Kimball and Nash Brogan, also counsel for numerous claimants, in a letter dated August 20th to the Minister. They referred to the MOU as a contract. In particular, they wrote:

> The MOU provides compensation to be based on Statements as defined. Unless the Province can actually disprove the specific allegation in a statement, then the statement is the only evidence and must result in the compensation that would follow. "Suspicions" or "concerns" about the accuracy of a statement are of no effect under the MOU. The contract is very specific.
>
> .....
>
> From our point of view, it appears the lawyers responding to claims did not understand, well enough, the specifics of the MOU, or if they do, they are ignoring the Province's clear obligation in favour of other considerations. This is not as it should be. We know, because of the process, that some people will be compensated who probably do not deserve to be compensated. It is our firm belief, that none of our clients fit into this category. But, we also know that virtually everyone compensated under this process, who has a legitimate claim, is going to give up a great deal that would otherwise be obtained in a courtroom.
>
> There is nothing in the MOU agreement that permits the Province to deny a claim outright because certain allegations are questionable. There is no room in the MOU for personal opinions of counsel. The Statements stand alone.

By August 14, 1996, 351 Demands had been received from claimants. However, the Murphys had identified 900 potential claimants (many of whom, obviously, had not yet filed a Demand).

On August 27th, 1996, Paula Simon sent a memorandum to the Minister of Justice and to the Minister of Finance, the Honourable William Gillis. Attached was a statistical breakdown of the Demands and settlements as of August 20, 1996: the Program had received 368 Demands and had responded to 222. Seventy-six claims had been settled, at a cost (including counselling) of

$3,821,000. The Province had rejected the claims of 17 individuals. Sixteen of them had filed requests for file review. Simon advised that although there were up to 900 persons identified as claimants, the internal investigators had yet to speak with a large number of them. She suspected that many of the persons now coming forward would allege less serious abuse, thereby lowering the amount of the average claim.

In September 1996, complaints from claimants' counsel continued. Ms. Derrick wrote to the Minister of Justice on behalf of herself and five others expressing concern that the compensation process was being guided by the same consideration that guided the Government's response to Donald Marshall's claim for compensation – to pay the lowest amount.[89] She wrote:

> We represent many survivors who believe that little has changed in Nova Scotia since the days of Donald Marshall's experience with respect to the way the victims of state abuse are treated. Many of our clients feel bitter towards the Province and revictimized as a result of the way their claims and the process are proceeding. It is the overall consensus of lawyers representing survivors with whom we have spoken that survivors are not being fairly compensated in this process even within limitations proposed by the Memorandum of Understanding.

My staff interviewed Paula Simon, Alison Scott, Sarah Bradfield and Amy Parker. It is clear that there was a divergence of philosophical approach. Simon was of the view that the claimants were very much victims and that assessors could not tell survivors that they were not telling the truth. She favoured higher awards. Scott was more sceptical of the claims. The others were somewhere in the middle. Parker recalled that file assessors were very upset at what they took to be the suggestions by some claimants' counsel that they were making 'low-ball' offers to the claimants.

There was marked frustration by those involved in the Program over the scarcity of information upon which they were required to base their decisions. In situations where they did not believe in the validity of a claim, there was not enough information to disprove it and, according to the design of the Program, the claim had to be accepted as valid. The assessors stated that the onus was on the Province to disprove the abuse alleged; the benefit of the doubt was given to the claimant.[90]

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[89] See *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Commission, 1989), Vol. I, p. 136. The Commissioners recommended that the methodology of determining compensation and quantum be revisited (p. 140).

[90] To be perfectly clear, this is how the assessors interpreted the Program. The MOU did not explicitly set out a burden of proof.

Once it was accepted that the abuse claimed had occurred, the file assessor would place the claim within a category in the compensation grid. Parker advised my staff that the assessors would compare the abuse set out in the Demand to a book of statements that served as examples for the categories of abuse set out in the MOU.[91] Subject to negotiation with counsel for the claimant, an offer would then be made based on the range of compensation provided in the grid.

Even with the limited information available to the file assessors, a number of them spoke of their growing disbelief in the nature and extent of the abuse being claimed. They cited instances where claims of serious sexual assaults were shown to be false. This led them to conclude that claims of physical abuse made in the same Demand were similarly untrue. However, compensation was still offered for the alleged physical abuse because the Program office had no information to specifically disprove it.

In Chapter VIII, I referred to the recovery by the IIU in the fall of 1995 of over 1,000 files from Shelburne and the Nova Scotia School for Girls. Investigators from the IIU continued efforts to obtain and review all relevant documentation. In May 1996, IIU investigators reviewed files stored in the Provincial archives (known as the "RG 72" documents)[92] and obtained historical materials relating to the institutions.

On June 7, 1996, IIU investigator Frank Chambers wrote to Fred Honsberger, Executive Director of Correctional Services, requesting his assistance in recovering institutional and correctional files. The IIU wanted to "conduct a full and complete search and report the existence of" all institutional records, documents, and files relating to former residents, and all information with respect to accident injury reports, incident reports, use of force reports, occurrence reports, public or private complaints, and all available medical records.

A similar request was made by the IIU to Gordon Gillis, then Deputy Minister in the Department of Community Services ("DCS"). This resulted in a general directive to all administrators and senior officials at DCS that no files containing information related to any former resident of Provincial residential centres be destroyed pending completion of the IIU investigation.

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[91] The MOU provided for the use of 'Statement Volumes:' statements taken by the Murphys considered to be representative of each category of compensation. (They could be submitted to a file reviewer to help guide his or her decision as to the proper amount of compensation.) The claimants succeeded in putting together a Statement Volume. The Government attempted to do likewise, but was unsuccessful because they could not obtain the consent of the individuals who gave the statements, as required under the MOU. To resolve this issue, the Government used the statements selected by the claimants, sometimes adopting the claimants' categorization of a statement, and sometimes changing the suggested categorization.

[92] RG 72 is the code used by the Public Archives of Nova Scotia for historical materials given to them by the Departments of Public Welfare and Social Services, predecessors to the Department of Community Services.

In early August, the Provincial Records Centre notified Linda Sawler, Chief Records Clerk for Justice, that there were records stored at their centre labelled "NSSG" and "NSSB." They had been scheduled to be destroyed, but the destruction had not taken place due to an omission in the authorizing documentation (namely, two signatures on the destruction order). The Deputy Minister of Justice subsequently issued a memorandum advising all staff that there must be no destruction of files or records pertaining to any Provincial residential centre or former resident of such a centre.[93]

Despite the discovery of records containing additional information, the Compensation Program raised concerns about the amount of information being provided to them. In a memorandum dated September 30, 1996, Paula Simon wrote to the head of the IIU, Bob Barss:

> These [resident summary sheets] are of very little use to us as they are presently filled out. As you can see in your review of the samples, often under the employee summary, question marks are frequently written in and sections are left blank. In addition, important information, for example employment dates, are usually not filled in.
>
> These summary sheets are of no use to us as they are presently completed. Could you please ask the staff to complete them with more accuracy. If that is too time consuming, they can stop sending them.

Meanwhile, it became apparent that the ordinary demands of the investigations already underway, together with the time required to review the newly discovered documents, exceeded the capacity of the IIU. Barss wrote to Simon on October 9, 1996, advising her that the entire unit – investigators and support staff – was working at 100% capacity and it was becoming impossible to meet her increasing demands. He described the situation in the following way:

> We have 3 support staff assigned to the ADR process on a full-time basis. I notice their workload includes a total of 41 files to be completed within the next few working days. While on paper, this may not look like a lot of work, there is an extensive amount of research

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[93] On November 10, 1994, the Minister of Justice wrote to his Deputy, directing that the destruction of files be held in abeyance until the investigator to be appointed (the position eventually held by Mr. Stratton) had an opportunity to examine the allegations of abuse at the former Nova Scotia School for Boys (Shelburne) and at residential facilities operated by DCS. This ban was partially lifted on July 31, 1995, on the condition that Alison Scott review all files before any destruction was carried out. On June 25, 1996, Chief Superintendent Dwight Bishop of the RCMP advised the Deputy Minister of Justice that there may be many documents in the possession of the Government that may end up being inadvertently destroyed through normal retention and destruction schedules. He requested that consideration be given to a directive to all Government departments that documents pertaining to former residents and staff not be destroyed before conclusion of the criminal investigation.

> involved in completing each file. This entails searching through boxes, daily logs, and copious other materials in our possession to ensure all information pertinent to the file is located. This information then has to be photocopied for our own records as well as for your purposes.
>
> We have two support staff assigned to inputting the various files and documents into our database, which will eventually make matters easier for the ADR staff; however, these staff members are also responsible for various assignments from the investigators and are frequently required to interrupt their data entry for other purposes.

Barss suggested that Simon approach the Deputy Minister for more staff to fill the immediate needs of the Compensation Program and the IIU.

3. EVENTS LEADING TO THE SUSPENSION OF THE PROGRAM

As noted before, by mid-August 1996, the Murphys had identified 900 potential claimants. Paula Simon calculated that the total cost of compensation for that number of claimants, assuming the average award remained constant, would exceed $51 million, rather than the $33.3 million allocated in the budget.

In September, the IIU started interviewing a number of current employees from Shelburne. In the view of the IIU, these interviews shed a different and significant light on at least some of the allegations of abuse.

David Peters, President of the NSGEU, wrote to the Minister of Justice on October 2, 1996:

> I am writing to request legal assistance on behalf of all employees, both management and unionized staff who received allegations of abuse [which were] subsequently found to be nothing more than unfounded allegations.
>
> As you know, the NSGEU has been providing legal support for all employees in the absence of support from the Employer. This is unacceptable. You have a responsibility to your employees who were wrongly accused.
>
> The Department of Justice has been providing legal assistance to anyone who files allegations but absolutely none for its employees. The Department's lack of understanding and total disregard for its employees' rights to natural justice and fair representation must not be allowed to continue. We hope the Department will review its previous position in light of the fact that so many of the allegations are frivolous in nature or simply not true.

Alison Scott wrote a memorandum dated October 10, 1996, to the Deputy Minister. She reported that the Murphys had advised her they had interviewed, or scheduled for interview, in excess of 1,000 former residents of Provincial institutions. She suggested that there may be potentially another 300 or more claimants who might come forward. She wrote as follows:

> Lawyers acting for the Province in the ADR program, including myself, have expressed concern about the lack of tools available under the MOU to assess credibility of the claims. During the negotiations we expected to be able to rely heavily in the ADR settlement negotiations on the judgment of our investigators as to the credibility of claimants. Unfortunately, this approach has not worked as the investigators are unable in many cases to offer an opinion.
>
> In those cases where the investigators are unable to offer opinions, the lawyer reviewing the file is left to discern credibility on the basis of the Facts-Probe Inc. statement and whatever documentary evidence is available. Frequently there is a dearth of institutional information that might explain injuries or predispositions to fantasy or otherwise. Under the MOU there is no right of cross-examination, and no right to lead contradictory evidence from independent sources. If the statement provided by the claimant is internally consistent, makes allegations against "known" perpetrators, and it checks out that the claimant was there when the alleged perpetrator was also there, the claim is essentially validated. It is very difficult in any claim under the MOU to challenge the type or frequency of abuse without the tools to test the information. The type and frequency of abuse determine the value of a claim under the grid. This inability has a direct financial impact on the value of the claims.
>
> At the same time, calls have come into the ADR office from other claimants asserting another claimant is untruthful. The Internal Investigation Unit has expressed the view that many of the claimants are fabricating information. The IIU based this opinion from their interviews of claimants and their review of files. Unfortunately their opinion is as much impression as it is fact and can't be advanced in the ADR process unless there is concrete material that can be produced. The RCMP have likewise expressed a similar view to that of the IIU, although the RCMP will not allow us to use any of the information they have to substantiate their view.
>
> The problem is that many of us have impressions as to the credibility or lack of credibility of claims, but none of us in the process are confident the system in use effectively allows false claims to be denied. As one of our lawyers put it: "In the criminal justice system, it is accepted that it is better that nine guilty men go free, than have one innocent person convicted. In the ADR process, we compensate 9 people to get to the one who deserves the compensation." While we have no way of knowing if the ratio is as high as nine to one, the point is that we are uncertain as to what the ratio might be, but I believe the potential is high, in light of the validation process.

Scott raised concerns that a complete abandonment of the Program could have a deleterious impact on some of the claimants and suggested other less harsh methods of ending the Program. She identified two alternatives. The first was the one used in New Brunswick, where early termination of their program was announced on 24 hours notice. Although this would not address the validation issues, it would reduce the Province's financial exposure by some $15 million (300 claims). Scott expressed the view that although some of the 300 might choose to litigate, the majority would not. The other alternative was to legislate a different process to replace the present one. Scott said this new process could use "similar, although not identical parameters to the present program, and allow more rigorous testing of information."

The first file reviews were not heard until September 1996. The MOU provided few details of the procedure to be followed on such reviews. On September 16, 1996, Ms. Derrick proposed the following procedure:

- As the survivor's lawyer, she would make a brief introduction of the Demand and the Province's response to it, identifying the essential issues;

- Unless she misstated or omitted some central detail, counsel for the Province would make limited comments, reserving argument until after the survivor spoke to the file reviewer;

- The survivor would address the file reviewer directly. The reviewer would be able to ask questions, but there would be no cross-examination of the survivor by anyone;

- Counsel for the survivor may need to draw his or her client out if they are having difficulty expressing themselves. The file reviewer may be asked to assist;

- Once the survivor is finished, Derrick would make her submissions in support of the Demand and the Province would then respond. There would be no formalized rules limiting reply and counter-reply. Any argumentative statements would be between counsel, and not directed to the survivor;

- The review would take place in an informal physical setting, with a seating arrangement around a table being preferred.

The Compensation Program drafted a reply, disagreeing with some of the procedures suggested by Ms. Derrick. However, the reply was never sent, and the actual file reviews usually proceeded in the manner outlined by Derrick.

In discussions with us, the Compensation Program staff expressed the opinion that file reviewers were generally not favourable to the positions taken by the Province. Substantially higher compensation amounts were being awarded on file review than had been offered by the assessors. For example, the first review decision was released on September 26, 1996. The Province's initial offer had been $2,000. The file reviewer awarded $40,000. An examination of other early file review decisions indicates a similar pattern. As further file reviews were held, the assessors became alarmed by decisions that imposed what they (the assessors) considered to be an unforeseen liability for abuse alleged to have been committed by non-employees, such as other residents, but "condoned" by provincial employees.[94]

On October 11, 1996, the Minister of Justice wrote to the Minister of Finance, telling him that the budget would be insufficient to meet the needs of the Compensation Program. He reported that the Province had received 503 Demands for compensation, but that Facts Probe Inc. (the Murphys) had taken 721 statements from survivors, with another 389 waiting to be interviewed. The Murphys projected an additional 200 requests for statements to be taken before the December 18th deadline, for a total of 1,310 Demands for compensation. The Minister of Justice commented that with a total population at Shelburne and the Truro School for Girls of 9,620, the projected 1,310 applications was not out of line with the experience of compensation programs in New Brunswick and Ontario.

The Minister of Justice enclosed a revised budget which estimated a total cost of $86 million – an over-expenditure from the initial budget of approximately $53 million. This was based on the assumption that the average award for compensation and counselling would remain constant.

Department of Justice officials held extensive meetings on October 15, 16, and 17, 1996.[95] An *ad hoc* committee (sometimes referred to as the 'Review Team') was formed to identify the range of options available to the Government and present a report to a 'Steering Committee' composed of the Deputy Ministers of Finance, Justice, and Community Services and P&P. The Review Team was to identify the expected maximum and minimum over-expenditure risks for the current and next fiscal years, to review the Program administration procedures in place in order to ensure efficiency and effectiveness, and to document efforts to recover some of the Program expenditures from the Province's insurers.

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[94] As indicated in Chapter VII, the MOU provided that survivors whose claims were validated were to be compensated for abuse "perpetrated, condoned, or directed by employees of the Province" during the time the survivors were resident in the named institutions. The MOU did not provide any further guidance as to the meaning of condonation.

[95] Among those present were Douglas Keefe, Alison Scott, Sarah Bradfield, Paula Simon, Averie McNary, Brian Seaman, Michele McKinnon, Clarence Guest and Kit Waters.

The Review Team formulated a number of scenarios and different options within each scenario. They can be broken down into two alternatives: 1. changes to bring in expenditures for compensation under or at the budget target, and 2. changes to "minimize the over-expenditure risk."

Some of the options identified to bring in expenditures for compensation at or under the budget target were to pass legislation terminating the existence of the MOU, and removing the right of claimants to litigate. In the place of the existing Program, the Government would unilaterally substitute a new program which could include: 1. the prorating of all claims according to severity, 2. settlement of all claims on a first come first serve basis, 3. restriction of eligibility (either based upon the date of the alleged abuse or specific alleged perpetrators), or 4. the establishment of a private trust, with trustees to determine criteria for distribution. Other scenarios included opting out of an ADR process and reverting to civil litigation.

As for the alternative of minimizing the over-expenditure risk, one method proposed was to enact legislation to restrict the MOU, but still permit civil litigation. Another method was to top up the Program budget in conjunction with a more restrictive MOU, thereby improving the current process to allow for greater control for the payment of claims.

On October 18, 1996, Paula Simon wrote a detailed letter to the Deputy Minister of Justice. In it, she referred to the recent meetings with senior officials from Justice and Finance and voiced her objections to the direction the Government appeared to be taking. She wrote:

> It appears after our discussions that there is a leaning towards breaking the MOU and making minor or wholesale changes to the process. Ms. Nancy Muise, Director of Auditing for the Department of Finance, stated a number of times over the past day and a half that an over-expenditure will not be tolerated. She also stated that they planned to audit the project and make changes to our process, assuming they can lower the projected budget over-expenditure. While I would welcome any assistance/suggestions auditing can give in relation to maximizing cost efficiency, it would appear that they are recommending breaking the MOU in order to accomplish this objective.
>
> Although we are encountering significant difficulty in implementing the MOU, the problem areas were identified as potential difficulties during the negotiations, and in meetings where we sought instructions from Dr. Gillis, the Minister of Justice at the time. The agreement that the Government had asked us to negotiate was based on the principles of fair compensation and early resolution for the survivors. It was also driven by concern over the cost to the Government, in terms of embarrassment and resources, of litigation and a possible public inquiry. Dr. Gillis has said publicly on many occasions that we have a moral responsibility to the survivors. I am concerned that the moral responsibility to the survivors may now be denied based on a larger number of survivors being identified than had been initially projected. It is my view that as the scale of the problem of abuse at these institutions has

> become increasing more apparent, the moral responsibility to the Government has also increased, not lessened.
>
> .....
>
> It was my understanding that the validation process was never intended to be rigorous. It was agreed that we should, for the most part, believe the statements given to Facts-Probe Inc. This was based on the premise that the majority of the survivors were telling the truth. Both the Government and the survivors had confidence in Messrs. Murphy, the Facts-Probe Inc. investigations [sic]. I have spoken to Messrs. Murphy, and they still feel that by far the vast majority of survivors are telling the truth.
>
> Notwithstanding the above, it was acknowledged during discussion[s] with Minister Gillis that this validation process would leave the process open to fraudulent claims. At the time, it was accepted that a small percentage of invalid claims would be paid, but, on balance, that this was an acceptable price to pay to meet the stated goals of fair and early compensation for survivors of abuse.

It is clear from this letter that Simon believed strongly that the Government should not consider breaking the MOU. She maintained that the abuse occurred, and that compensation should be paid accordingly.

In the meantime, in at least four compensation files that had been settled, information subsequently came to light that could have had an impact on the assessment of the claims. In one of these files, the information was sufficiently cogent to lead the file assessor to suggest that even though a settlement had been reached through negotiation, the payment should not be made (and it was not).

On October 22, 1996, the Deputy Minister instructed Ms. Simon to ask the IIU to begin investigating immediately the claims contained in a list of files that were then in the file review process. Forty-seven claims were on the list. On the following day, the Deputy Minister instructed Simon that the Compensation Program was not to process any new claims. Any new Demands received should simply be acknowledged. All claims that had not been paid were to be investigated by the IIU before any further action was taken.

In a letter dated October 23, 1996, Anne Derrick called for a public explanation about what was going on with the Compensation Program. She also sought an assurance that the Province would honour its obligations.

On October 31st, Paula Simon wrote to the Deputy Minister. She expressed her deep concern about the implications of breaking the MOU. Since it appeared to her the Program would be restructured, and her position would be terminated, she tendered her resignation effective that date.

On November 1, 1996, the Province issued a press release announcing the suspension of the Program. The Minister of Justice cited the overwhelming volume of claims, as well as new information, as justification for the suspension. He said the Government needed to take time to "fully review this information." The press release did not say how long the review would take, but assurances were given that it would proceed as quickly as possible. The Minister maintained that the Government remained committed to an ADR process to provide compensation to those who legitimately deserved it.

4. AUDIT OF CLAIM FILES

As noted in Chapter I, my staff carried out a review of claim files. A list of files was produced from the database maintained by the Compensation Program. According to this list, 1.235 claims were processed by file assessors in the Compensation Program.[96] Of the 1,235, my staff randomly selected 90,[97] and reviewed all material that was available, first, to the file assessor in responding to the Demand, and second, at the file review stage, where applicable. In so doing, I have tried to better understand the way in which claims were processed, and to ascertain some of the difficulties encountered in the operation of the Program, and the reasons for them.

For purposes of examining how they were processed, the randomly selected claim files were sorted according to what I considered to be the three phases of the Compensation Program:

- The first, which began on June 17, 1996 and lasted until the Program was put on hold November 1, 1996. This phase was governed by the MOU;[98]

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[96] As will be discussed later in this Report, a definitive number as to the total caseload processed by the Program is difficult to ascertain. Statistical reports prepared in March 2000 and July 2001 show the caseload to have been 1,252 and 1,249 respectively. A final statistical report shows the total number of claims processed to be 1,246.

[97] The file names were provided to us in alphabetical order and every 14th file was reviewed.

[98] Even if completed after November 1, 1996, a claim was still considered to be within the first phase if it was processed according to parameters of the original MOU.

- The second, which began in December 1996 and lasted until November 1997. As will be set out in a subsequent chapter, this phase was governed by the MOU as varied by the Government on December 6, 1996;

- The third, which began on November 6, 1997 and lasted until the end of the Program. As explained later, this phase was governed by the Compensation for Institutional Abuse Program Guidelines.

According to statistical reports provided by the Program office to the Minister of Justice, 580 Demands were made in the first phase of the Program. The assessors responded to 431. In 23 cases, the claim was denied. In 14, the assessor accepted the amount demanded. Three hundred and ninety-one offers were made, and in three cases the assessor requested more information. On the whole, 278 cases were completed.[99]

Of the 90 files we reviewed, 31 were completed in the first phase of the Program. Those 31 files are discussed here.

In none of the 31 files was there any employee input. I cannot say whether there was any employee input in the rest of the 278 files completed during this period, but it is clear that in the first phase of the Program the MOU did not provide any opportunity for the employees' voice to be heard.

In a small percentage of the files we reviewed, the alleged abusers were deceased or otherwise unavailable to provide input.[100] However, in a majority of the files, allegations were made against former and current employees who were available to be contacted. In those files, 63 former and current employees were named as abusers. To the best of my knowledge, only 10 of them were deceased at the time the statements were given. My staff could not find any indication of an attempt having been made to contact any of the remaining employees to seek their response to the allegations asserted by the claimants.[101]

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[99] A November 21, 1996 statistical report suggested that 276 claims were completed. The Minister of Justice also informed the Legislative Assembly on November 20th and 21st that the Province had settled 276 cases. However, later statistical reports of December 3 and 11, 1996, as well as a November 30, 1996 letter from an actuarial firm to the Minister, indicated that 278 cases had been settled.

[100] Unavailability could be due to health problems.

[101] As mentioned later in this section, in one file an allegation was made against an individual whom the file assessor did not consider an employee. Prior to file review an IIU investigator located the individual. She confirmed that she had been a provincial employee at Shelburne for two brief periods of time. However, no statement was taken from her regarding the allegation that she had sexually abused a claimant.

The manner in which the claims were submitted was similar in most cases that we reviewed. As prescribed by the MOU, claimants submitted a Demand together with a statement taken by Facts-Probe Inc. (the Murphys), the IIU, or a police agency. In the Demands submitted by counsel on behalf of claimants, the allegations made in the Murphy statements were usually summarized, submissions were made as to the categorization of the abuse claimed (according to the grid set out in the MOU), and the amount of compensation requested was stated. In the majority of cases, the compensation requested was at the upper limit of the suggested category.

Our review shows that in 28 files only a Murphy statement was relied upon. In two cases, RCMP statements, taken in 1991 during the Nova Scotia School for Girls criminal investigation, were available to the file assessors. In one other case, the claimant also submitted a transcript of his testimony in the MacDougall criminal trial.

Our review revealed that, during this phase of the Program, the IIU investigative support to the assessors consisted of providing them with institutional records (index cards, journal entries, employment records). There were instances where the institutional records included such things as medical reports, social history reports, incident reports and school documentation. The provision of such other documentation seemed to depend on which institution was involved, and how recent the allegation in the claim was: the more recent it was, the more likely it was that additional documentation was available.

The written Responses by the assessors to Demands were generally short, usually just over one page. They reflected the problems that assessors were facing during the process. In many cases, the assessors indicated to claimants' counsel that:

> Further information may be forthcoming; however, due to the deadlines in the Memorandum of Understanding (MOU), I am unable to consider any further documentation which may be received. I have reviewed: the information received from the ADR investigators; the MOU; the Demand; institutional employee information available to me and relevant case law.

In formulating the Response, the assessor would check the available institutional records. If the records showed that the claimant and the alleged abuser were both at the institution at the time of the alleged abuse, the assessors would accept the claim as valid. However, in most cases the assessors put the claim in a lower category, or at least at the lower end of the same category.

As stated before, the MOU provided that if a claim could not be settled by negotiation, the claimant could proceed to file review. According to a statistical report from the Program, as of December 11, 1996, 101 claimants had opted for file review.[102] Thirty-three of the reviews had been completed. In the 31 cases reviewed by my staff, six claimants had proceeded to file review. All of their reviews had been completed.

The following summaries of files we reviewed illustrate how the Program operated.

P.B., a former resident of the Nova Scotia Youth Training School during the mid-1950s, filed a Demand on June 17, 1996, requesting $30,000 compensation (category 9 – minor sexual and minor physical abuse). She alleged that employee X grabbed and rubbed her breast, and that employee Y struck her hands with a heavy wooden ruler (because she was in class looking out the window at a ball game) and dragged her to a "cell" and kept her there for approximately one hour. The Murphys advised Alison Scott that the alleged abusers were probably deceased. The records for the claimant were available from the School.

The file assessor offered $2,500 plus a $5,000 counselling allotment. She stated that the Program office could not locate any employment records for the alleged sexual abuser, that back in 1955 corporal punishment in schools was accepted, and that there had been no "cell" at the school. She suggested that P.B. may have been taken to a quiet room to settle down.

The claimant requested that her claim go to file review. The review was held by way of conference call on October 9,1996, with the claimant participating. Despite the lack of records to show that the alleged sexual abuser was employed at the School, at the end of the call the file reviewer assessed the claim at $20,250. The decision was confirmed in a letter dated October 9, 1996. In setting out how the award was determined, the file reviewer commented as follows: "Credibility – Ms. [file assessor] acknowledged that [P.B.] was telling the truth." The file reviewer found the grabbing of the breast to be at the low end of the minor sexual abuse scale. She found that the use of a heavy ruler-like object on two occasions, causing redness, swelling and stinging, to be minor physical abuse, albeit at the low end of the scale. She also found that the claimant was placed in a jail-like room with bars on the door and window, holding that this was not a 'timeout' to quiet P.B. down, but was "unjustified." It was, accordingly, an aggravating factor, adding $250 to the award.

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[102] As noted above, by this time, assessors had responded to 431 claims, accepting 14, rejecting 23, and making an offer in 391.

G.B., a former resident of Shelburne, alleged he was the victim of physical abuse (hitting, beating, punching or slapping) perpetrated by a number of unnamed and named counsellors, including employees A and B. A Demand was filed on June 17, 1996, requesting $25,000 (category 10 - medium physical abuse). In a Response dated August 1, 1996, the file assessor noted that according to the Province's records, employee A did not start his employment until well after the time that G.B. attended Shelburne, and that there was no record of a school employee with the name of employee B. The assessor asserted that the other abuse alleged by the claimant was minor in nature (category 12) and offered $2,000.

The claimant requested that his claim go to file review. The file review was held by telephone conference call with the claimant participating. In a written decision dated October 18,1996, the file reviewer commented as follows on the issue of credibility:

> Before dealing with the issue of category and quantum, I would like to comment on credibility as it was an issue in this case. [G.B.] claims abuse at the hands of [employee A] and [employee B]. The Province does not have records of either man being employed by them at the time [G.B.] was at the Shelburne School for Boys, but do have records of [employee A] being employed at a much later date. [G.B.] is clear on the names and descriptions of the employees involve [sic] and does not feel it possible that he is mistaken.
>
> I accept [G.B.'s] allegations with regard to these two employees. Records are not always indicative of the way things were at the time and [G.B.] as pointed out could have used other names of employees if it was his intention to deceive as records of those employees are consistent with his recall. Also [G.B.] had an out so to speak, and could have said that he may be wrong but stood steadfast to his recollection. These points coupled with the overall credibility of [G.B.] lead me to accept his allegation in relation to those two employees.

The file reviewer went on to conclude that the abuse fell within category 10 (medium physical abuse), as being chronic physical abuse, and awarded $18,000 in compensation plus the applicable counselling allotment.

D.H., a former resident of Shelburne submitted a Demand on June 17, 1996. In it, he claimed he had been subjected for months to repeated and persistent intercourse with X, a woman alleged to have been an employee, whom he could not name but described by her function at the school. He further claimed that he was fondled by a second employee, and that a third employee digitally penetrated him during a strip search. In respect of physical abuse, D.H. alleged that a number of named counsellors had "beat him at least three time a week." He requested compensation under category 2 (severe sexual and medium physical abuse) in the amount of $100,000.

The file assessor, in her Response of August 1, 1996, disputed the contention that D.H. had been "subjected" to repeated and persistent intercourse with X, given that D.H. was almost certainly over the age of consent at the time they had sexual relations. The assessor also stated that X was listed in the records as being in a "job shadowing program," at Shelburne to learn job skills, and was therefore not a Nova Scotia Government employee. The assessor further argued that X was not in a position of authority over D.H. With respect to the strip search, the assessor contended it did not constitute sexual abuse: it was initiated because D.H. was caught with a lighter he was not supposed to have. Finally, the assessor suggested that the alleged physical abuse constituted minor physical abuse. She made an offer of $3,000.

The claimant elected to go to file review. In the course of preparing for the file review, the assessor contacted the IIU and asked for any further documentation about X, the person that was at Shelburne doing the job shadowing. The IIU reported back that a search of all available records had failed to turn up any employment records for X, but that they had contacted her and she had said she had been a provincial employee on two short occasions. There is no indication that X was ever asked if she knew D.H. or had had any relationship with him. The information that X was indeed employed at Shelburne at the relevant time was disclosed to the claimant and to the file reviewer.

The file review was held on October 30, 1996, with the claimant present. A written decision was released November 12, 1996. The file reviewer noted that there was extensive questioning of D.H. by her and by the file assessor. In relation to the claim of physical abuse, D.H. named 10 employees as having punched, slapped or hit him with objects. He claimed permanent hearing loss from one such incident, but advanced no medical evidence to support the injury. The file reviewer observed that the Province had originally taken the position that the physical abuse was minor, but upon hearing the claimant's evidence changed their characterization to that of medium physical abuse.

In relation to the sexual abuse, the reviewer stated that the Province did not dispute that the strip search occurred, but contended that it was a valid search. The reviewer accepted that it did occur, and found on a balance of probabilities that it was a sexual assault. With respect to the allegation of repeated sex acts with X, the file reviewer concluded:

> I find that [X] was an employee at Shelburne, and if she did not have actual authority over [D.H.] she had the appearance to [D.H.] of having authority or influence over him, and she had an obligation to exercise good and proper judgment in her interaction with the residents at Shelburne. If this allegation was in a public school scenario I submit that the [X] in question would have been fired for abuse of her position, judgment and sexual abuse of a student. Clearly [X] acted inappropriately and she abused her apparent or real authority to gain sexual favours from [D.H.].

> In discussion with Ms. Derrick [counsel for D.H.] and [the file assessor] at the review hearing, it was agreed that the allegation regarding [X] was either severe sexual abuse or not sexual abuse at all. The frequency and nature of the sexual abuse alleged does not fit within the classification of medium sexual abuse. The only use [sic] is whether or not the sexual relations were consensual. I find that the sexual relations between [D.H.] and [X] were not consensual and they must be characterized as severe sexual abuse.

The file reviewer concluded that this was a category 2 (severe sexual and medium physical) claim, and awarded D.H. $90,000 plus a $10,000 counselling allotment.

During our audit, we also reviewed three files where the claimant had been a complainant in the criminal proceedings against former employees of either Shelburne or the Nova Scotia School for Girls ("NSSG"). In the first file, the claimant was G.C., a former resident of NSSG. She had given a statement to the RCMP in 1991 alleging that George Moss had fondled her on five - six occasions. In addition, she had provided a statement to the Murphys during the Stratton investigation recounting the same misconduct by Moss.[103] G.C.'s Demand, dated June 12, 1996, requested an award in the range of $35,000 to $40,000 (category 8 -- medium sexual abuse). The assessor wrote a Response on July 30,1996, that accepted the claim as being properly classified as medium sexual abuse, but made an offer of $30,000 (placing it at the low end of the category 8), plus a counselling allotment of $7,500. G.C. accepted the offer.

In the second file, the claimant was R.G., also a former resident of NSSG. She gave a statement to the Murphys during the Stratton investigation alleging sexual abuse by Moss in the nature of "french" kissing, fondling, masturbation, digital penetration and vaginal intercourse.[104] She submitted a Demand on June 12, 1996. In it, she requested an award at the top of category 8 (medium sexual abuse) in the amount of $50,000. The Response by the file assessor, dated August 2, 1996, agreed that the incidents were properly classified as medium sexual abuse, but offered the claimant $32,000. Through her counsel, R.G. submitted a counter-offer to settle for $42,000; counsel also indicated that if this was not acceptable, he had instructions to proceed to file review.

The assessor responded in a letter dated August 13, 1996. He indicated that additional information had been brought to his attention, including R.G.'s 1991 statement to the RCMP in which she had complained of only one incident of abuse involving Moss (involving fondling). He stated that he had not known of this statement and other related materials at the time of his initial

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[103] On October 9, 1992, Moss pled guilty to four out of seven charges of indecent assault, and was sentenced to 12 months incarceration. G.C. was not one of the complainants named in the four charges to which Moss pled guilty. She was a complainant in one of the charges to which he did not plead guilty.

[104] Moss pled guilty to indecent assault in relation to R.G.

Response, but in light of them his first offer was generous and would not be increased. R.G. accepted the offer.

In the third file, the claimant was P.H., one of the 10 MacDougall complainants. He submitted a Demand on July 2,1996, which enclosed his two Murphy statements (one given during the Stratton investigation and the other given on April 22,1996) and a transcript of his testimony from the MacDougall trial. P.H. claimed not only for the sexual abuse perpetrated by MacDougall, but also alleged that MacDougall and eight other counsellors had physically abused him. He requested compensation under category 6 (medium sexual and physical abuse) in the amount of $60,000. The file assessor responded on August 27,1996. She agreed that the sexual abuse suffered by P.H. may be properly categorized as medium sexual abuse, but at the low end. She also asserted that the allegations of physical abuse did not result in any claimed injury. She offered compensation in the amount of $30,000. The claim was eventually settled on September 17, 1996, for $44,000, plus a counselling allotment of $7,500 as a category 7 claim (medium sexual and minor physical abuse).

5. ANALYSIS

As I noted in a previous chapter, the Government had created a Compensation Program that did not contain a true validation process. The absence of meaningful validation is supported by an examination of the early operation of the Program.

As outlined above, my staff randomly reviewed a number of claim files to assist in providing me with an accurate sense of how the Program operated in practice. This random review demonstrated that during the early operation of the Program file assessors 'accepted' claimants' assertions of sexual and physical abuse without any input from the current or former employees who were alleged to have committed the abuse or from witnesses who might reasonably be expected to have relevant evidence on the issue. As well, file assessors 'accepted' claimants' assertions of abuse without the benefit of documentation that might bear upon the claimants' credibility or reliability. (This is not intended as a reflection on the assessors, but on the Program itself.) Perhaps the argument could be made that employees were not entitled to be full parties to the design of an ADR process. But even if that were true, it remained sheer folly to accept abuse claims as valid without even knowing what the implicated employee had to say.

The number of claims being processed, the time constraints imposed, the limited information available to assessors, the recognition that abuse was to be presumed, the absence of any right to *test the claimant's evidence or to call contradictory evidence even if it were available, all contributed to the absence of a credible process to properly evaluate claims.*

My review revealed that there were instances where claims of sexual abuse were regarded by assessors as demonstrably false – for example, where abuse was claimed against an employee who had not even been at the institution when the claimant was present. Assessors might nonetheless agree to compensate the claimant for other alleged abuse, usually on the basis that there was no concrete proof to dispute those remaining allegations.[105] *Of course, it is possible that these other allegations were true. But I find it deeply problematic that a deliberate falsehood would not be regarded as virtually disqualifying the claimant from compensation. A program that determines that a claimant has lied about part of a claim, but nonetheless settles the balance of the claim, as if no lie had been exposed, lacks credibility.*

Similarly, some of the claims were regarded with incredulity by the file assessors but, absent a demonstrable falsehood, they did not feel that they could deny the claim. Instead, they felt that they could only rely upon the perceived improbabilities of the claims to negotiate a lesser amount.

Another scenario presented itself. Individuals who had testified in the criminal process sometimes claimed abuse far more extensive than testified to earlier. Under these circumstances, assessors treated the claim as exaggerated and tried to settle the claim at an amount compatible with the criminal testimony. In this sense, claimants who had testified in the criminal proceedings might be challenged on their statements in a way that was unavailable to assessors for the balance of claimants.

Generally, file assessors expressed frustration that they did not have sufficient – or, indeed, any – information, nor the tools to adequately test claims that they had reason to doubt.

That being said, it became obvious to me that there was not always a uniformity of approach amongst file assessors. Some viewed the claims more sceptically than others. As well, some who initially regarded the vast majority of claims as credible came to modify their views, even on the limited information available to them, as more and more claims were processed.

When assessors did respond by highlighting dubious aspects of the claim – often in the context of a counteroffer – claimants and their counsel, who had been told that their allegations would be accepted unless there was concrete evidence to the contrary, became frustrated. Counsel

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[105] Sometimes, the claimant would purport to 'withdraw' the deliberate falsehood.

for the claimants submitted that, at times, file assessors arbitrarily rejected claims, and harmed their clients through insensitive challenges to their veracity. They felt that their clients were being re-victimized through the process itself, which, they said, should have been governed by the need to ensure that their clients felt that they were "believed, respected and acknowledged." The point was repeatedly made to the Government that the assessors were contravening the MOU since it contemplated that, absent evidence specifically disproving the Murphy statements, compensation was to be provided. "Suspicions" or "concerns" about the accuracy of a statement were said to be of no effect under the MOU. Claimants also advised me that their counselling often had to focus on the adverse effects of the compensation process, rather than the original abuse.

Our random review of the claim files permits me to conclude that some claims – whatever their actual merits – were deserving of close scrutiny and invited serious doubts about their veracity. A true validation process would have permitted these claims to be properly evaluated. Instead, file assessors were driven to either accept dubious claims because they could not be disproven, or engage in the equally flawed process of settling them at reduced amounts. The latter approach was largely motivated by the realization that, absent demonstrable falsehoods, the file reviewers were likely to accept the claims in full. Even recognizing this flawed process, assessors should not have settled claims where any deliberate falsehoods had been demonstrated. This could only further undermine any remaining credibility of the Program. The concerns expressed here are further addressed in later chapters as the Program continues.

None of these criticisms is directed to the claimants or their counsel. They correctly perceived that the approach by assessors to their claims was, at times, incompatible with the spirit of the negotiations leading to the MOU, and the MOU itself. Nor should these criticisms be borne by the file assessors. They were themselves trapped within a flawed process. Furthermore, I do not believe, as alleged by claimants' counsel at the time, that file assessors were systemically attempting to 'low ball' true victims of abuse.

Additional evidence as to the flawed character of the validation process is drawn from the fact that the Compensation Program sought input from the Murphys respecting the credibility of claimants. For the reasons reflected in Chapter V, the Murphys were not well situated to provide accurate assessments of credibility. They had collected information from complainants, but had not tested the statements, either through further questioning of the complainants, a comparison with previous statements made by the complainants and others, or a review of medical or institutional records. Indeed, some assessors and file reviewers remarked that obvious, follow-up questions were not asked by the Murphys. The post-Stratton statements taken by the Murphys were similar in form. Again, this is not a criticism of the Murphys: it reflects the instructions they were given.

Any opinions expressed by the Murphys on the issue of credibility would have been largely based on their assessment of claimants' demeanour. Credibility assessments based on demeanour alone are notoriously unreliable. As was said by the British Columbia Court of Appeal in Faryna v. Chorny:[106] *"If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box."*

In Alison Scott's e-mail to Amy Parker, the point was made that, in the absence of any right to test statements through cross-examination or to lead contradictory evidence, the only control – albeit minimal – that the Province had to evaluate truth and credibility was found in the information that the Murphys could impart to assessors. Hence, she felt that claimants should not be permitted to introduce non-Murphy statements which would not permit the Province to bring the Murphys' judgment to bear on the issue of credibility. It was obvious to me that some file assessors looked to the Murphys largely because they (the assessors) were otherwise devoid of information to make proper assessments. With respect, the perceived need to resort to the Murphys' assessment of credibility demonstrated the bankruptcy of the Program's validation process.

The Murphys themselves recognized the limited value of their assessments of credibility, certainly in discussions with my staff. They indicated that they would advise assessors that the claimants seemed convincing, but that they (the Murphys) were not psychologists and could not make a real determination of the claimants' veracity. Regardless of what was precisely communicated to assessors by the Murphys, Ms. Scott's October 10, 1996 memorandum to the Deputy Minister did reflect that they were unable in many cases to offer an opinion (leading her to comment that any expected reliance upon the investigators as to credibility had proven to be unworkable).

During this period, the NSGEU and counsel retained by them to assist current employees expressed their concern that compensation was being paid before IIU investigations were complete and before the employees' side of the story had been heard. Ms. Scott's October 10, 1996 memorandum to the Deputy Minister reflected the concern that the MOU did not provide those involved in the Program with the tools to properly assess claims. It was felt that the potential for compensating many false claims, given the validation process, was high. I agree that all those concerns were fully warranted.

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[106] [1952] 2 D.L.R. 354 at pp. 356-7.

The Minister of Justice issued a press release on November 1, 1996, suspending the operation of the Compensation Program to permit a review of the Program. He cited the number of claims, the discovery of new information, and the responsibility to fully review this information. He explained that the review would take time, but that the Department of Justice was still committed to an ADR process.

It is obvious from my review of the documents that there were a number of circumstances that explain the Government's decision to suspend the Program on November 1, 1996. These included:

- *The anticipated over-expenditure of the Compensation Program budget given the increased number of claimants;*
- *Perceived problems with the file review process;*
- *The discovery of additional information from documentation and from employees that could impact on the assessment of claims;*
- *The lack of tools in the Compensation Program process to effectively test credibility.*

Claimants' counsel questioned whether the suspension was truly motivated by the discovery of additional information or the perceived problems with the validation process. It was suggested that the prime reason was budgetary: the Program was simply regarded as costing too much money.

I am not in a position to rank the reasons for the suspension of the Program. I am satisfied, however, that all of the above contributed to the decision.

The suspension undoubtedly caused turmoil to true victims of abuse. Nonetheless, I am unable to conclude that the Government acted unreasonably in suspending the Program, given the serious concerns about its design and implementation, and how those concerns potentially had an impact on the overall resources of the Province. Of course, as I reflect throughout this Report, the most serious deficiencies in the Program could, and should have been, foreseen. Had they been foreseen, a redress program might have been designed and implemented that served the needs and interests of true victims of abuse, but not at the expense of fairness to other affected parties or to the credibility of the Program itself.

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Events During the Suspension

1. INTRODUCTION

On November 1, 1996, the Government announced that the Compensation Program was placed on hold so it could take stock of concerns that had arisen during the first few months of the process, including a significant increase in the number of claims and the discovery of hundreds of files that were thought to have been destroyed. The suspension had some immediate effects:

- Outstanding Government offers to settle claims were put on hold, but offers that had been accepted on or prior to October 31, 1996, would be paid in full;
- All file reviews were placed on hold, but where reviews had taken place and decisions were pending, amounts awarded would be paid;
- Claimants who had signed a release as a prerequisite to proceeding to file review could withdraw their release (thereby permitting a claim to be advanced in the ordinary courts);

However, Demands could still be made by claimants, the December 18, 1996 deadline for filing a Notice of Claim remained unchanged, and counselling continued to be available.

The Government maintained that it was still committed to an ADR process, although it was clear that the Program would be reviewed. No mention was made of what might happen to the Memorandum of Understanding ("MOU") or how long the review would take. This chapter looks at the reaction to the suspension and some of the issues canvassed in the course of the Government's review.

2. REACTION TO THE SUSPENSION

Reaction to the announced suspension was immediate. Anne Derrick, John McKiggan and Josh Arnold, counsel for survivors, held a press conference the same day as the announcement. In a prepared statement, Derrick said as follows:

> Survivors of institutional abuse bear terrible scars from their experiences and have been invited by this Government to come forward, tell their stories and apply for compensation. Many of survivors are coming forward for the first time, having been brutalized and ignored as children when they tried to report the abuse they were being subjected to.
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> For this to truly be a restorative process, survivors must be treated with respect; they must be informed and advised about what is going on. The Government is publicly accountable for this process and their obligations under the Memorandum of Understanding must be rigorously adhered to. Any failure to observe these responsibilities is re-victimization of the survivors and is destructive to their efforts to heal and move on with their lives. We expect the Province to live up to its stated commitment to compensate survivors in accordance with the Memorandum.

A number of lawyers representing claimants wrote to the Minister of Justice protesting the announced suspension. For example, McKiggan wrote on November 4, 1996, stating that "the Province's act is a violation of the MOU and a breach of the contractual obligations owed by the Province to the survivors," and that "the Government's actions are a violation of the legal and moral commitment the Government made to survivors." He requested a meeting with the Minister, indicating that if the issue could not be resolved he would be forced to take steps to enforce the Government's obligation to his clients.

Derrick also wrote to the Minister on November 4th, complaining that the suspension without notice was disrespectful and insensitive towards survivors and, for many, represented yet another breach of trust. She requested a meeting as soon as possible with the Minister and other lawyers who had been centrally involved in the process, for a full and frank explanation about the decision to suspend the Program, the implications of the decision, the time lines involved and the nature and extent of the review contemplated.

The Minister responded by suggesting a meeting on November 12th. Derrick agreed, but cautioned that she and her colleagues, representing more than 600 survivors, would not be coming to the meeting to discuss reopening the terms of the Memorandum of Understanding.

Fifteen lawyers representing claimants met with the Minister and Deputy Minister as scheduled on November 12th. Amongst other things, the following issues were discussed:

- Additional time required to review files.
- Consideration by the Government to pay amounts awarded over time;
- The Government's intention to wait until after December 18th to decide what it was going to do (in order to know the number of claims it was facing);
- Access by claimants to RG-72 (the archival designation for historical records in the Public Archives);
- File reviews;
- The RCMP investigation (Operation HOPE);
- The claimants' views that the IIU interviews were tough, while the RCMP interviews were compassionate.

A joint letter was written by counsel for the claimants after the meeting. They reiterated "as strongly as possible" their position that the current state of affairs was unacceptable. They advised:

> The uncertainty surrounding the status of the M.O.U. is causing a great deal of stress and turmoil for our clients. We are under considerable pressure to take immediate steps to respond to the Province's actions. We are currently investigating all of our client's options, including a representative class action suit for punitive and general damages, individual law suits for compensation, an application to court to enforce the Memorandum, to name but a few.

The lawyers asked the Government to announce its commitment to the ADR process as outlined in the MOU and stated their expectation that the Province will continue with the process, using additional funding if required.

The Minister wrote on November 19th to all counsel for claimants. He referred to the enormous undertaking faced by Operation Hope due to the growing number of allegations and the volume of paper work involved. He noted:

> Normally, a police investigation will occur first, before employee discipline proceedings, and before litigation respecting compensation. We are trying to do everything quickly because of our obligations to survivors and to those who will be in our care in the future. However, there is a real risk the investigation for the purposes of compensation and discipline could jeopardize the criminal prosecution process.

The Minister pointed out that consideration had to be given to greater integration of the operations of Facts-Probe Inc. (the Murphys), the IIU, and the RCMP, as well as the computer systems of the latter two. He suggested that "a more comprehensive approach to the investigation" would both assist those with valid claims and better address concerns about fraudulent claims.

Lastly, the Minister stated that his Department had an obligation to act on information in its possession for the protection of both children who may be in its care in the future and the public who may encounter perpetrators of abuse. He recognized that this obligation may conflict with the wishes of claimants who do not want to provide information for the purpose of disciplinary or criminal investigations, but argued that there was an over-riding public interest to be served. He concluded that there may have to be changes in the use made by the Department of information provided by claimants.[107] He proposed that a further meeting be held on November 22nd.

Ms. Derrick responded on November 21st. She said she was astonished by the Minister's letter, since none of the issues he mentioned were ever raised or even hinted at during the meeting of November 12th or in the earlier announcement of the suspension of the Compensation Program. This created the impression that the Minister was engaging in an *ex post facto* rationalization of the decision to suspend the process. She agreed to attend the meeting on November 22nd, but added that the concerns she would carry into the meeting were as before: 1. when would the Government restart the compensation process in accordance with its obligations under the MOU, and 2. did the Government intend to fully honour its obligations under the MOU? Derrick also pointed out that the Government had initiated the compensation process, participated in the development of the MOU, and compensated claimants with full knowledge that there was an extensive criminal investigation underway.

3. DIFFICULTIES IDENTIFIED BY THE ASSESSORS

Before dealing with the meeting of November 22, 1996, it is appropriate to refer at this point to the difficulties file assessors perceived in the Program. In a memorandum dated October 30, 1996, Amy Parker, Sarah Bradfield and Averie McNary described the file review process as the biggest problem within the existing framework. They explained:

> The most pressing problem we face with file reviews is that file reviewers are being asked by the Survivors' lawyers to make decisions on things which we feel are not within their

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[107] The Government's consideration of this issue is outlined in greater detail later in this chapter.

jurisdiction. Through negotiations, our plan was that the file reviewers' role would be to review all documentation and correspondence which passed between counsel and make a decision on quantum.

.....

In our opinion, file reviewers should not be making decisions on the following issues:

1. Whether certain documentation should be introduced at file review (such as negotiation correspondence, case law, others' Statements, etc.).

2. Whether they can force people to travel to file reviews and whether they hold file reviews in hotel rooms or in available (free) office space.

3. What constitutes "corroboration," and other similar legal questions. One file reviewer decided that because a student complained to a counsellor that he was being sexually molested by other students; the counsellor did nothing; and the student continued to be assaulted, the case was made out that the student was subjected to condoned sexual abuse. We had offered the person $8,500 based on abuse perpetrated by employees; the inclusion of the "condoned" abuse raised the award to $80,000. That is a difference of $71,500.

   The lawyers, Anne Derrick particularly, are raising this condonation issue in almost every case. Ms. Derrick argued before a file reviewer last Friday that even though the student never complained to counsellors about sexual assaults by other students, the staff "voluntarily condoned" the abuse by "looking the other way," and that they should have known there was rampant sexual abuse within the institution. It is extremely likely that this type of argument will succeed at some file reviews; this will raise the awards dramatically. Once it becomes successful in relatively clear situations, the lawyers will push it in much murkier situations. Given our "record" at file review, they are likely to be successful.

4. Anne Derrick is now proposing to introduce case law at file review around issues such as condonation and consensual sexual activity. She has also advised that she will attempt to introduce articles and case law surrounding recovered memory of childhood sexual abuse. Increasingly, file reviews are increasingly (sic) becoming similar to administrative or court proceedings. This was not the intention during negotiations, and will require a much more time-intensive commitment from the Department if we choose to respond to these submissions.

5. Anne Derrick and others are taking the position that file review decisions can be introduced as precedents in other file reviews. The MOU makes no provision for this. We object to the introduction of other file review decisions, particularly because each situation os so individual. Additionally, as you know, file review decisions do not favour the Department's position.

6. File reviews are successfully being used by the lawyers as an opportunity to re-open negotiations. File reviewers are taking the opportunity to pass judgment on all aspects of Government's operation of the institutions, including whether there were

> sufficient numbers of staff, whether supervision methods were adequate, and whether such things as strapping and isolation were appropriate discipline methods.
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> .....
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> 7. We find it increasingly difficult to adhere to the principles espoused in the MOU (respectful, timely compensation) in situations where file reviewers and counsel take every opportunity to allow survivors to state the "facts." For instance, file reviewers are accepting the survivors' allegations that they should have received medical treatment for a particular injury. They are also accepting survivors' assertions that long-term disabilities must have arisen from abuse suffered at Shelburne because nothing else could have caused it since. The Province is prevented from cross-examining or introducing any evidence to the contrary.
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> We are very concerned that unless the Department takes a strict stand about what role the file reviewers should play, the file reviewers will ride rough-shod over the Department. This will result in much larger awards being made to the Survivors, and will necessitate significantly more resources being assigned to the compensation project.

The assessors sought instructions from the Deputy Minister on some of the issues raised, and then concluded with the following "advice:"

> We wish to make it clear that, in our opinion, file reviews should not continue if the existing program is not maintained. File review decisions are increasingly unfavourable to the Province; because this is so, counsel are pushing the boundaries of file review to achieve more for their clients. We anticipate that the financial impact for government in allowing file reviews to continue will be very unfavourable.
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> If, as we understand, the rationale behind suspending the program is that the Province cannot afford to compensate the number of victims who have come forward in this fiscal year, we must advise that in our view file reviews pose the most substantial risk of awards which exceed our previous projections. Should the Province suspend the program but continue with file reviews, this risk increases dramatically because file reviewers will respond to the negative impact of the program's suspension.
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> A mentioned above, we offer these comments in respect of one facet of the existing program. We do not wish to be misunderstood; it is not our advice that the program be suspended. However, if the decision is made to suspend the program, we feel that it must be completely suspended.

Three substantial awards were made in this period, at least in part, for condoned abuse. In one, the claimant alleged sexual assaults by other students. He felt the counsellors knew the assaults were happening and even arranged them. He also alleged incidents of physical abuse by counsellors, including one that resulted in injuries for which he needed stitches. The Demand filed on his behalf claimed severe sexual and medium physical abuse and requested compensation in the amount of $100,000.

The response by the Government was that there was no basis to the assertion that counsellors knew of the alleged sexual assaults being committed by the other residents. The claimant could not provide the names of anyone to whom he purportedly reported the assaults. The Government took the position that, in order for a claim to be made out under the heading of condonation, some positive act by a staff member was required, and not a mere omission to act. With respect to the alleged physical abuse, the Government stated that there was no record of any hospitalization for the stitches the claimant said he received. Nonetheless, an offer of $2,500, plus $5,000 for counselling, was made by the file assessor. In a later attempt to settle the claim, a file assessor "acknowledged" the act of abuse by the employee and offered $5,000, in addition to the $5,000 counselling award.

The case went to file review. In a decision dated November 7, 1996, the reviewer concluded that the allegation by the complainant fell within the scope of condonation: all that was required was for staff to forgive or overlook the claimed abuse. An award was made of $90,000, plus a $10,000 counselling allotment. There is no indication in the file that any of the alleged abusers – staff or residents – were contacted before the file review. However, it appears that *after* the file review was concluded, one of the former employee alleged to have physically assaulted the claimant was contacted by the IIU. He offered to provide an affidavit refuting the allegation made against him.

In the second case, the claimant alleged that after one act of anal rape by a counsellor, he was 'fair game' for sexual abuse by residents. He also alleged beatings and physical abuse by staff. A Demand was made claiming severe sexual and medium physical abuse. The claimant requested compensation of $90,000. The file assessor responded that a single instance of anal rape by an employee constituted medium sexual abuse and that the abuse by other residents was not compensable. With regard to the complaint of beatings and other physical abuse, the assessor stated: "I do not take issue with his descriptions." An offer of $45,000 was made, plus $7,500 for counselling.

The matter proceeded to file review. In a decision released on October 11, 1996, the reviewer noted that she had examined the Stratton Report, the survivor's statements, the Demand and the Response. She noted that the Stratton Report found that staff and officials were aware that abuse was taking place, but had taken no positive steps to end it until the mid-1970s. She concluded from the claimant's statement that the alleged rapist was a paedophile and hence in no position to protect the claimant. The claimed abuse was condoned, especially since it happened openly in public areas that should have been monitored and supervised. As a result, she made an award of

$80,000, plus a counselling allotment of $10,000. There is no indication in the file that either the former employee alleged to have committed the sexual assault, or any other potential witness, was contacted.

In the third case, severe sexual and medium physical abuse was alleged and compensation of $100,000 was requested. The claimant alleged anal rapes by other residents that were condoned by staff. He had given a statement to the Murphys claiming that he was forced to masturbate one boy and, when he complained to a counsellor, the latter beat him for being a liar. He said that this led to the older residents sodomizing him twice a week for the rest of his stay.

The file assessor agreed that the physical abuse claimed was properly categorized as medium, but took the position that there was no evidence that the counsellors knew about the abuse that the claimant said he suffered at the hands of other residents (other than the incident of forced masturbation).

The file review lasted one hour. The decision noted the Province's concession that the claimant suffered medium physical abuse at the hands of employees,[108] and that there was no issue of credibility for the sexual abuse claimed since the Province did not challenge the claimant's assertions that he was sexually abused by the other residents. What was challenged was whether the Provincial employees had condoned the abuse. The file reviewer observed that the Province did not present any evidence that it was reasonable for the counsellor who received the complaint to believe that the resident was lying or that he had a history of trouble. She accordingly concluded that the counsellor had not only failed in his obligation to respond to the allegation of abuse, but had greeted it with brutality. The file reviewer held that the requirement of condonation can be satisfied by omission, and that the counsellor condoned the sexual abuse by failing to investigate the complaint. She awarded $80,000, plus $10,000 for counselling. The alleged abuser was available to be contacted, but there is no indication in the file that he ever was.

The Government delayed payment of the file review awards in these three cases. On November 29, 1996, an application was brought in the Supreme Court of Nova Scotia for an order compelling the Government to make payment. It was eventually settled when the Government did so. Letters of apology were also provided by the Minister to the claimants.

During November, the file assessors produced memoranda outlining what they considered to be the problems in the Compensation Program, and some of the options that could resolve or, at least, ameliorate the situation. In considering available options, it was assumed that the review of the Program would be guided by the following principles:

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[108] The decision made reference to employees (plural) even though only one was named.

- The Government acknowledges moral responsibility for abuse.
- The Government is committed to an ADR process.
- The ADR process is to be compassionate, confidential, timely and respectful of victims.

The file assessors made it clear that the 45-day time limit for Responses must change. They identified the need to design what they referred to as an upgraded investigation process. They made a number of recommendations, including the need for the Program office and IIU to have a clear understanding of the goals and standards of the Program, the use of sworn statements, and a clarification of the role of the IIU.

Douglas J. Keefe, Executive Director of Legal Services, responded to these early recommendations in an e-mail on November 7, 1996. He wrote:

> I don't think we are trying to save money as much as ensure to the extent possible that payments are deserved. I have no doubt that in the process of improving the validation, money will be saved that would have been awarded improperly, but that is secondary. Not everyone may agree but I think we have to keep coming back to that as a starting point for what we are now doing.

The head of the IIU, Robert Barss, had earlier written to the Deputy Minister regarding an expanded role for the IIU in an amended ADR process. He indicated that the IIU could or should:

- Identify and investigate those ADR files that are deceitful and could lead to mischief and false pretense charges by the RCMP;
- Conduct interviews of past employees, including counsellors, supervisors, managers, probation officers and medical staff and others;
- Interview all witnesses to the allegations – current employees, former employees, and other residents;
- Interview all claimants;

- Carry out an investigative interpretation of all documents;
- Improve coordination of "initial 'pure version statements' from the complainants and Facts-Probe Inc.;"
- Obtain medical and other release forms from all complainants;
- Ensure that employees and ex-employees are properly identified through photo line-ups;
- Offer the opportunity for polygraph testing;
- Provide investigative findings which could be used in the ADR process;
- Carry out investigations of current employees in parallel with a review of all ADR claims (that is, carry out its original mandate at the same time as its expanded one);
- Prepare an analytical profile of all abusers, relating employee and complainant, corresponding location, date and time of incidents.

In a commentary accompanying this document, Mr. Barss noted the trust that had been built up between IIU staff and current employees and their representatives. He reported that a review of 250 files revealed that 40 claimants made allegations of sexual abuse against two ex-employees who were not present at the institution at the time of the alleged abuse.

Meetings were held in November 1996 between the RCMP, the IIU and officials from the Department of Justice. The focus of these meetings was the better coordination of investigative efforts. In particular, there was discussion of the use of a computer system to store, analyze and retrieve information.

David Horner, of the IIU, prepared a document dated November 18, 1996, outlining Justice's planned acquisition of computer software and scanning technology. Horner pointed out that the IIU was challenged by the effort to recover, maintain and secure a large volume of documentary materials that had previously been thought not to exist. The effort was hampered by the continued growth of the investigation and by an inadequate computer system. Horner suggested that advanced technology was needed, and recommended a software product known as CLEIMS (Canadian Law Enforcement Information Management System).

It was believed that CLEIMS would substantially decrease the turnaround time on investigations. The IIU would be able to provide a complete investigation file, including documentation and records, not only to officials running the ADR process, but to lawyers representing complainants, counsel for employees, Operation HOPE, civil litigation staff from Justice, and the Public Prosecution Service, "as needed or directed."

In a memorandum dated November 21, 1996, the file assessors further examined the issues that would have to be addressed if the Province was going to move forward with a revised compensation process. They proceeded on the premise that there was to be an improvement in the investigation process in order to increase the program's ability to compensate legitimate claims.[109]

The assessors wrote that an improved investigation was intended to ameliorate the integrity of the program – it may or may not reduce costs. They noted that it is not possible to 'prove' or 'validate' all claims, but suggested that improvement in the investigative process may lead to the "lessening of doubt in many claims." They then raised a number of questions, including the following:

- By what standard will it be said that a claim is proven or disproven? What is the burden of proof?
- How much evidence is needed? This is not now defined.
- What is to be evidence? What rules of admissibility do we use?
- What do we do with cases in which part of the claimant's story is clearly disproven and the rest is in the doubtful or proven category?
- What means can be used to reduce the number of doubtful cases?
- By how much can the number of doubtful cases be reduced?
- In reducing "the doubt," will there be an increase in the number of proven as well as unproven claims?
- How will the doubtful cases be resolved?

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[109] However, they first asked whether they were correct to assume that the Province was still committed to compensating legitimate claimants in an "alternative" that is compassionate, timely and respectful.

- Will the benefit of the doubt remain with the survivor? This is the case now.
- How will disputes (with the claimant) about whether a claim is doubtful or proven or disproven be resolved?
- Is there to be a mechanism which replaces the file review process?
- What evidence will be permitted at such proceedings?
- Is the file reviewer to be like a judge or a mediator?
- Could a satisfactory process be designed which eliminated a review altogether?
- Should the reviewer act as a facilitator, with his or her jurisdiction restricted to the credibility of the claim?
- Can use be made of the *Arbitration Act*?[110]
- What knowledge or skills should file reviewers possess?
- How do we maximize their independence?
- Should the process for taking statements be more stringent?
- Will there be more access to information from files and interviews with third parties?

On November 21st, Justice officials considered some of the problems that had been reported to them by file assessors, the IIU and the RCMP. They concluded that it was essential that any statements taken by the Murphys be 'pure version' statements, and that there be no leading questions, no paraphrasing of language, no conclusions, nor any information offered to a claimant.

A meeting was held with the Murphys on November 21st. It was decided that they would continue to take statements from claimants – 'pure version' statements, with greater detail and using the exact words of the victim. The Murphys would also ask follow-up questions if the claimant's statement did not correspond to the relevant documentary evidence. Lastly, it was decided that the

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[110] R.S.N.S. 1990, c. 19.

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Murphys would not take a statement if the claimant did not sign a release authorizing use of the statement in disciplinary proceedings, the RCMP investigation and the Child Abuse Registry.

In a meeting on November 22, 1996, between representatives of the IIU and Operation HOPE, it was learned that the RCMP favoured a software program named Supertext. The IIU, however, took the position that CLEIMS was a superior system for their needs.

4. MEETING OF NOVEMBER 22, 1996

The final meeting between Justice officials and lawyers representing claimants also took place on November 22nd. Notes of this meeting were made by representatives of both sides. The issues discussed and positions articulated were these:

- Although the Minister was aware, from information provided by the claimants and the Family Services Association, about the difficulties for claimants caused by the delay, the Government was concerned about the impact of the compensation process on the criminal investigation, and ultimately the potential to bring alleged perpetrators to justice.

- Operation HOPE had expressed concern over the impact that multiple statements might have on the criminal process. The RCMP had requested that the Compensation Program not restart until March 1997 or later, partly in order to allow time for the integration of an RCMP/IIU computer system. Counsel for the claimants voiced vehement opposition to delaying the entire process until the spring of 1997.

- The Deputy Minister advised counsel for the claimants that the Government now realized that it was inappropriate for claimants to be able to direct that information not go to the RCMP or the Child Abuse Registry. Since the Department had this information, it had to act on it. Counsel for the claimants suggested the Government enact legislation to exempt from the duty to report complaints received from those involved in the Compensation Program.[111]

- The Government intended to change the Compensation Program. Although no specifics had been decided, a number of issues had been identified, including:

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[111] The duty to report suspected abuse is examined in the following section.

- The summary validation process used to date was now unacceptable, and the Government intended to conduct a more thorough investigation of each survivor's statement prior to making an offer of compensation. The Murphy statements were "preliminary," and there was no opportunity built into the MOU for the Government to assess a survivor's credibility. Counsel for the claimants pointed out that they had proposed an arbitration process and the Government had rejected it.

- Credibility issues at file review were almost invariably decided in favour of the claimant and there was no opportunity for the Government to assess the credibility of a survivor prior to the file review.

- A system was being considered in which the current roster of reviewers would be maintained, but the file reviewer would be chosen by rotation, rather than having the survivor choose;

- The 45-day turnaround time was inadequate due to the volume of documents and a more thorough validation process being considered by the Government.

- The Government was considering payment of awards over time (with interest).

- Counsel for the claimants agreed that fraudulent claims should not be compensated and suggested negotiating a clause to deal with fraud. Counsel for the claimants requested information about fraud levels and whether or not 3% of claims were fraudulent. The notes from the meeting do not record any specific response from Government officials. The officials simply expressed concern that there had been fraud, including collusion amongst claimants and exaggeration of claims.

- The Deputy Minister noted the number of claims coming forward, particularly alleging physical violence. He commented that the Government did not have the employee's side of it.

- Counsel for the claimants indicated that on some things they would "hold their fire," but there were other issues that could trigger going to court.

The Deputy Minister wrote to Harry Murphy on December 3, 1996, confirming that in all statements taken after November 25th, the claimant should be told that the use of the statement could not be limited to the compensation process. If a person did not agree that the information could be used for all purposes, then no statement should be taken. The Deputy Minister explained:

> The Department of Justice has an obligation to act on information in its possession for the protection of children who may be in our care in the future, and to protect the public who may encounter perpetrators of abuse. We currently have a statutory obligation to provide information to the Department of Community Services which may be entered in the Child Abuse Registry. This may conflict with the wishes of survivors of institutional abuse who do not want to provide information for the purpose of discipline or for criminal investigations. However, there is an overriding public interest to be served.

5. DUTY TO REPORT ABUSE

While the Government's review of the Compensation Program was focussed on the perceived defects in the compensation process, officials in the Department of Community Services ("DCS") were also addressing another important issue: the duty to report the cases of alleged abuse. This was dealt with in a document dated November 15, 1996, by Alex F. Shaw, Q.C., a solicitor in DCS. It was entitled *Commentary on Section 25(2) Children and Family Services Act – Institutional Abuse and The Duty to Report It*,[112] and it addressed two issues:

> 1. Do investigative bodies such as the IIU, the RCMP, and even an ADR program, have a duty under the *Children and Family Services Act* to report suspicions of child abuse to the Minister of Community Services? If so, does it follow that they are therefore precluded from receiving allegations from victims "in confidence"?
>
> 2. When the Minister receives information alleging that a person has committed an abusive act, does he have a duty to inquire into whether the alleged perpetrator poses a present risk to children and, if so, does he have to take action to minimize such a risk? If there is such duty to take action, does it yield to any considerations that have to do with interfering in the investigative processes underway by the investigative bodies?

Mr. Shaw identified two interpretations of the Act – one broad, the other narrow – but he concluded that under either interpretation the duty existed to report incidents of child abuse inflicted at any time in the past by current employees. Furthermore, this duty superceded any privilege which might normally apply to that information. In his view, it was therefore inappropriate for any governmental investigative body to receive statements from victims "in confidence" without clarifying that the information may be reportable under the *Children and Family Services Act*. Only an Act of the legislature could remove the duty to report.

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[112] Section 25(2) of the Act (S.N.S. 1990, c. 5) deals with the duty to report third-party abuse. It provides as follows: "Every person who has information, *whether or not it is confidential or privileged,* indicating that a child is or may be suffering or may have suffered abuse by a person other than a parent or guardian shall forthwith report the information to an agency." (Emphasis added.)

Mr. Shaw suggested that a protocol was needed to deal with this matter. He warned that delay was inexcusable and potentially costly, and noted concerns which required further study. For instance, while the IIU was "warehousing information reportable under the Act," did it have the required expertise on when to report abuse, as stipulated in the legislation?

A review of the documentation available to my staff indicates that this important issue – the duty to report – was not considered by government officials during the design of the Compensation Program. There was a recognition by Alison Scott, counsel at Justice, in the summer of 1995 that there could be proceedings under s. 63 of the *Children and Family Services Act* to place the names of abusers in the Child Abuse Register.[113] However, it was believed that information that had been and would be provided to the Murphys up until December 1996 could not be used without the prior permission of the persons providing the information. In meetings with my staff, officials involved in the design of the Program confirmed that the duty to report was not considered. They were frank in acknowledging that it was a matter that should have been addressed. The implications of this failure are discussed in other parts of this Report.

6. ANNOUNCEMENT OF THE RESUMPTION OF THE PROGRAM

On December 6, 1996, the Minister of Justice, the Honourable Jay Abbass, announced in a press release that the program would resume, but with a number of changes designed to improve the process:

- Staff resources would be increased to address the sheer volume of claimants.
- The 45-day time limit for responding to demands would be extended to 120 days, though efforts would be made to respond earlier if possible.

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[113] A Child Abuse Register was first established in Nova Scotia in 1976. It was upgraded in 1991 to include abuse by perpetrators who are not parents or guardians of the abused child and to make the Register available for screening purposes.

- The IIU would expand their investigation from discipline of current employees to include investigation of compensation claims. Resources would be added to enable this.

- Increased resources would allow staff to catalogue and input new information recently found relating to Shelburne.

- To preserve the integrity of the criminal investigation, a statement protocol would be developed by the RCMP, IIU and Facts Probe Inc. All three organizations would share information and coordinate investigations to the fullest extent possible, recognizing the independence of the police investigation.

- Victims would now be advised that all statements provided for compensation purposes would be used for investigative purposes (whether criminal or disciplinary) or the Child Abuse Registry. The Minister stated that "[w]e understand it has been difficult for people to come forward, and their wish for confidentiality, but we have a moral and legal obligation to bring perpetrators of abuse to justice."

- To ensure that file reviewers were provided with the best available evidence, claimants and the Province would now be permitted to submit written, recorded or documentary proof from anyone who had evidence relating to a claim. The Minister stated that "[t]his allows victims to bring forward statements from witnesses, and ensures the file reviewers have the most complete information possible when making their decisions."

- File reviewers would now be assigned on a rotating basis.

- All file reviews would be conducted within Nova Scotia. Those claimants living outside the province would be able to participate by telephone. The file review process would resume February 1, 1997.

- Though levels of compensation would remain the same, awards over $10,000 would be paid over a four-year period. The greater of $10,000 or 20% of the award would be paid in one lump sum payment, and the remainder paid over time with interest. The opportunity to use counselling allotments would remain unaffected – those allotments would still be accessible immediately. Counselling allotments would be available for a four-year period.

- The Government would continue to accept claims or notices of claims until December 18, 1996. The settlement of claims would resume once the total number of claims was known on December 19, 1996.

- Compensation would only be provided for abuse by employees and not for abuse of one resident by another. This was described as a "clarification."

The Minister repeated the Government's commitment that those who were abused would be compensated, and he strongly endorsed the ADR process as the best method to provide compensation.

On the same date as the announcement, the Minister wrote to claimants' counsel to explain how the changes would affect the compensation process. He advised of some further information not contained in the press release:

- Offers made before November 1, 1996, were reinstated immediately, except that awards over $10,000 would now be paid over time.

- A new release form would be used for all claims.

- During the assessment of claims, Justice or the IIU might require an interview with the claimant, as written statements alone may not always provide enough information.

- File review decisions were not to be treated as precedents in other file reviews.

- Both the claimant and the Province could be represented by counsel at the file review. (Claimants still had the right to appear personally).

- No compensation would be paid for negligence;

- Counselling allotments would be accessible for five years (even though the press release had announced that the allotments would be accessible for four years).

7. ANALYSIS

The Compensation Program was suspended on November 1, 1996. One month later, on December 6, 1996, it was reinstated. To evaluate the decisions to suspend and reinstate the Program, it is important for me here to draw together what we know about the Program up to its suspension.

Up to the suspension, 271 claim files had been completed.[114] *The vast majority had been settled. Approximately 33 had been decided by file reviewers. Compensation was being paid in all these cases. Whether settled or decided by a file reviewer, all of these claims had been processed under the MOU. This meant that assessors generally presumed, in the absence of demonstrable falsehood, that abuse had occurred. As earlier noted, even in the face of some demonstrable falsehoods, the balance of a claim might be settled because it could not be disproven. Most disputes turned on where the abuse fell within the designated categories. Though the documents pertaining to the Compensation Program do not always permit precise calculations, it appears that approximately 424 claims were processed prior to the Program's suspension. Only 22 claims were entirely denied by file assessors (subject to the claimants' right to file review). Offers were made in 383 cases.*[115]

Despite the large number of cases completed (271) and the larger number of offers made (383), assessors and file reviewers had no input from current or former employees as to the merits of any of these claims. No one was interviewing past employees. Such interviews did not commence until January 1997, after the Program was reinstated. As I outline in the next chapter, even then, they were initially only telephone contacts that could not be used in file reviews. Very limited interviews of current employees by the IIU had only commenced in September 1996, and those were directed to the disciplinary proceedings, rather than the compensation process. The IIU was providing file assessors with limited information. In fact, it was made clear to the IIU that the Program did not contemplate that the IIU would truly investigate these claims or conduct witness interviews to assist the assessors. It follows that offers were made to claimants, and file review decisions were rendered, without resort to evidence of fundamental importance. Hence, my earlier determination that the validation process was seriously flawed and lacked credibility.

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[114] Department of Finance, Internal Audit Division, Working Draft Report, January 17, 1997. This Report contains statistics as of October 29, 1996. As the Province was notified of the acceptance of offers that had been made prior to suspension, and file review decisions were released for hearings held before the suspension, the number of completed claim files increased to 278.

[115] There were six requests for further information.

It can be debated whether the Program's suspension was primarily driven by financial concerns or by concerns that the Program was not doing a very good job in credibly separating out true and false claims. It is probably most accurate to say that the Government's attention was more easily drawn to the concerns expressed by Program staff and others about the Program's credibility because it was also costing the Government an extraordinary amount of money. (A revised Government estimate as of October 11, 1996, forecast the Program to cost $86 million (assuming no changes to the Program), resulting in an over-expenditure of the original estimate of approximately $52 million.)[116]

Despite the fact that the Government apparently recognized that there were problems with the Program's design and operation, prompting its suspension, I am not convinced that the Government fully appreciated the extent of these problems.

The RCMP had requested that the Program not be reinstated until at least March 1997. It was hoped that this would permit the integration of the RCMP and IIU computer systems. As well, the Minister had noted, in his dealings with claimants' counsel, that normally disciplinary proceedings and litigation respecting compensation follow a police investigation. He expressed concern that the investigation for the purposes of compensation and discipline could jeopardize any prosecution. Despite the concerns expressed both by the RCMP and the Minister, the Program was quickly reinstated. A compelling case could be made for the termination, or a prolonged suspension, of the Program, while, in the least, the criminal investigation ran its course. Of course, terminating the Program would have generated further legal debate over whether the Government could unilaterally do so. This highlights another flaw in the Program's design: inadequate consideration was given to the legal status of the MOU and when, if at all, the Program could be modified or terminated.

Even if the Program was to be reinstated, Government did so – with due respect – in a 'patchwork' fashion. As discussed in later chapters, immediately after the Program was reinstated, it was obvious that the Program required further reworking.

Having said that, I recognize that a number of the changes made to the Program appeared to be reasonable ones. If the Program was to continue, it was appropriate to extend the 45-day turn around time for the Province's Responses and increase staff resources to allow claims to be investigated and newly discovered documents to be catalogued and put in place. Development of a statement-taking protocol, recognition that the IIU would be permitted to interview claimants

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[116] Department of Finance, Internal Audit Division, Working Draft Report, January 17, 1997.

rather than rely solely upon prior statements, and the right of the parties to submit written, recorded or documentary proof from anyone who had evidence relating to a claim also represented improvements over the MOU.

It made sense to assign file reviewers on a rotating basis. The entitlement of each claimant to select his or her own file reviewer contributed to the lack of credibility of the validation process and invited suspicion that reviewers were selected based upon prior generous awards to other claimants. Another reasonable alternative would have been to provide for selection of file reviewers on a rotating basis subject to a mechanism that would permit selection of a particular file reviewer, on consent, based on special expertise, knowledge or experience.

It was also appropriate to rectify the arrangement that had permitted claimants to restrict the use that could be made of serious allegations of abuse, regardless of the potential dangers to vulnerable young people or the public at large. Such an arrangement was incompatible with the Government's duty to protect young people from suspected abuse.

The Government decided to pay out awards over time, rather than in one lump sum payment. There had been accounts – some of which were verified by individuals who spoke with me – of large awards being squandered by recipients or otherwise misused. Some, although not all, of the claimants who spoke with me suggested that payments over time made sense and avoided abuses. Others favoured an approach that would permit the method of payment to be determined on a case-by-case basis. For example, some claimants used lump sum awards to purchase homes. They felt that it would have been unfair to penalize them for the conduct of others or for the Government to have controlled the manner in which they were to be compensated. In my view, the Government might reasonably have decided, at the outset of the process, that payments would be made in installments rather than in one lump sum. Another reasonable alternative, which I favour, would enable some relief from that method of payment in particular circumstances. I address this issue more fully in my recommendations. This change to the Program was an understandable one, although its timing and the fact that it was done unilaterally did not enhance the Program in the eyes of true victims.

Despite some changes for the better, the Program remained seriously flawed. Continuation of the Program did not await completion of either the criminal or the IIU investigation. Indeed, it did not even await receipt by Government of the particulars of the claims being advanced, which would be contained either in claimant statements or in the Demands. As I outline later in this Report, true validation of individual claims could not be done in a vacuum; from the perspective of both claimants and employees, validation would benefit from some ability to compare claims and *the other evidence bearing upon them. Such investigative comparisons could yield corroborative evidence of individual claims. It could also demonstrate the likelihood of collusion or the contamination of one claimant's account by another.*

The Program now contemplated the use of written, recorded or documentary proof, but it would remain difficult to use that material credibly within a process that permitted no witness other than the claimant to be called at the file review. The turn around time for Responses was extended only to 120 days, unlikely to permit a thorough internal investigation and assessment – especially given the likely flood of additional notices of claims to be received on or before December 18, 1996, and the fact that the recently discovered documentation had not yet been catalogued and put in place. Further, the changes to the Program were unlikely to affect a number of files. There were as many as 152 claim files on which the Province had made offers that remained outstanding. It was not contemplated that these offers, albeit made within a flawed process, would be re-evaluated. Finally, the framework within which validation was to occur – a process in which abuse was presumed, absent demonstrated falsehood – was unlikely to be significantly affected by these changes.

An examination of the Program, as reinstated, supports these conclusions. As described in the next chapter, cracks quickly surfaced in the reinstated Program. Assessors and investigators struggled to meet the 120-day deadlines and were forced to decide which investigations should be abandoned in the interests of time and resources. They were inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Assessors and file reviewers struggled with how, if at all, employee statements could or should be used to resolve issues of credibility.

In the meantime, true victims of abuse suffered. The position advanced by claimants' counsel – namely, that such victims were being re-victimized by unilateral changes in the process – had merit. Undoubtedly, these changes were also seen as a betrayal not only of the spirit, but of the express terms of the MOU, negotiated in good faith.

Some changes were seen as outright reversals of the MOU. For example, the reinstated Program did not compensate for inter-resident abuse. This was a result of the Government's dissatisfaction with how some file reviewers had addressed the issue of condonation. The change was described as a "clarification." With respect, condonation was expressly addressed, rightly or wrongly, in the MOU. The Government's surprise when compensation was awarded on the basis of condonation represented, at best, a misunderstanding of what its own negotiators had agreed to.

I agree with the perspective of claimants' counsel that this change was more properly characterized as a reversal than a clarification.

Be that as it may, on balance, I am of the view that the flaws in the Compensation Program required rectification, despite the potential impact upon some claimants. A Program that lacked credibility and fairness did not ultimately enure to the benefit of true victims either, since their claims were tarred with the same lack of credibility that pervaded the Program itself. However, had the Government structured a credible Program from the outset, it would have better served those whom the Program was designed to help. Further, as alluded to above, and elaborated on in the chapters that follow, the changes which the Government made did not rectify the serious flaws in the Program.

XI

Resumption of the Program

1. INTRODUCTION

When the Government agreed to a Compensation Program in May 1996, it presumed that there would be approximately 500 claims of abuse. Although it was recognized that there may be those who would exaggerate the abuse or even seek compensation to which they were not truly entitled, it was also presumed that the allegations would be, for the most part, true. Clearly, the first presumption was incorrect and doubts were raised about the second. The combined impact of these two factors on the resources of the Province contributed to the suspension of the Program on November 1, 1996. Furthermore, the number of Demands and notices by claimants that they intended to make Demands made it impossible to effectively administer the Program with the resources that had been allocated to it.

On December 6, 1996, the Minister of Justice announced a number of changes to the Compensation Program. These were summarized in the previous chapter. In this chapter, I address the impact of those changes, and the later development of further changes, contained in the November 6, 1997 Guidelines.

2. DEVELOPMENTS AFTER RESUMPTION

The Internal Investigations Unit ("IIU") grew. When the Government announced the resumption of the Program, it indicated that the IIU would now be involved in claims investigation. Its staff was subsequently increased to 15 investigators and nine secretarial and data research support personnel. In an e-mail to the Deputy Minister of Justice dated December 11, 1996, the head of the IIU, Robert Barss, detailed why this increase was necessary:

> Because of the case management complexity and volume associated with the claim validation process, it will require a complete focus of investigative resources not distracted by other investigative activities. I propose assigning 10 investigators plus the case manager (Frank Chambers) to work with the ADR program manager in achieving the claim validation objectives established between all the concerned parties on a day to day basis. The reporting responsibilities will be between the claim validation case manager and the ADR program manager. My office will provide the strategic overview and investigation continuity between the claim validation, internal investigation, criminal investigations, civil litigation investigations and all other assignments as determined by the Deputies of Justice and Community Services.
>
> Four investigators will be assigned to my office to continue with the internal investigations presently in progress. This group of investigators will also maintain the ongoing liaison with Operation HOPE staff regarding the perpetrators. This group will also be responsible for information disclosure as well as evidence continuity gathered by all staff of the IIU (CLEIMS). This group will also maintain the ongoing activity of information retrieval within Government as well as respond to investigation follow-ups from the civil litigators and employee lawyers.

The file assessors, Sarah Bradfield, Averie McNary, Amy Parker and Barbara Patton, raised a number of administrative and policy issues in a memorandum to the Deputy Minister, dated December 13, 1996. They recommended the immediate appointment of a Program director and a Program administrator. The administrator would be responsible for handling the large volume of day-to-day tasks, and the director would be responsible for:

> both the assessment and investigation aspect of compensation claims. The PD [Program Director] will determine investigative priorities, coordinate the IIU and the ADR assessment team, liaise with the RCMP, ensure automated systems are in place, evaluate the program, analyze the flow of anticipated claims and recommend staffing and management needs.

The assessors also urged that four additional full-time assessors be hired as soon as possible. File reviews were to resume on February 1, 1997, and the four current assessors anticipated that their commitments to those reviews would render them unavailable to respond to new claims. They also recommended:

- That all new interviews (including the Murphy intake interviews) be videotaped, thereby allowing for better assessment of the statements, based on full knowledge of the questions asked and the demeanour of the claimants;

- That all new statements be sworn;

- That the IIU be given 60 days to provide the Program office with its completed investigation of a claim, allowing the assessors 60 days to evaluate the information, determine whether they need more information and draft a Response to the claim;
- If the assessors decide they need further information, that the IIU conduct further interviews, with the assessors providing direction as to the areas of questioning required;
- That the IIU give investigative priority to claims that had been scheduled for file review. All other claims should be prioritized chronologically by intake date.

In a meeting on December 12, 1996, the Murphys advised the Deputy Minister that, in light of all of the circumstances, they would not continue to be involved in taking statements from claimants. The withdrawal of the Murphys was communicated by the Minister of Justice to all counsel and unrepresented claimants in a letter dated January 10, 1997. He advised that Facts-Probe Inc. had decided not to participate in implementing the new statement-taking protocol, but that statements already taken by the Murphys would be accepted for the purpose of compensation claims. The Minister added:

> In future, all statements will be taken by either the Department of Justice Internal Investigation Unit or the RCMP, or a combined team. The decision as to who will take the statement will be made in consultation with the RCMP, and there will be instances where separate statements will have to be taken to satisfy the needs of the respective agencies. Statements will be videotaped and a copy of the tape will be given to counsel or unrepresented claimants, except where the statement is given to the RCMP alone. In that case, a copy of the tape will be available from the RCMP upon request.

The Deputy Minister advised the assessors that, as of January 7, 1997, the name of the Program was changed from "Compensation for Survivors of Institutional Abuse" to simply "Compensation for Institutional Abuse." All references to "survivors" were to be changed to "claimants." Further, given the uncertain legal status of the Memorandum of Understanding ("MOU"), the assessors were not to refer to it. One of the assessors, Barbara Patton, had prepared a draft of new Guidelines for the Program by January 6, 1997.

An IIU investigator, Frank Chambers, became the Case Manager for the IIU Claims Validation Investigations. He contacted the Compensation Program office and advised that his team had taken a 'quick look' at the 86 files which had outstanding offers.[117] He suggested that eight be placed on hold so that the IIU could investigate them. For the other 78, he suggested that the Program office proceed with the limited information already available, commenting that although the IIU would like to do more, it did not have the time and resources to do so. As it turned out, some of the eight files singled out by Chambers had already been settled, and others were almost at the point of settlement. The Program office concluded that it needed more information before reversing the positions it had taken.[118]

A letter was sent by Amy Parker on January 10, 1997 to all claimants' counsel regarding the form of the release to be signed by a claimant as a precondition to receiving any compensation or proceeding to file review. The new releases removed all references to "survivor" and the MOU. The new terms of payment were set out.[119] Claimants were required to acknowledge their understanding that their statements may be used without notice in civil actions, discipline proceedings, police investigations, or in reports of child abuse to the Department of Community Services. Claimants were also to acknowledge that the consequences for knowingly providing false statements could include legal action for the return of monies and criminal proceedings; the Province could also withhold payments which might be due "unless the proceedings were fully resolved" in the claimant's favour.

Sgt. Jim Brown, Case Manager for Operation HOPE, forwarded a letter to all lawyers representing claimants advising them of the status of the RCMP investigation and of some of the changes in protocol. He noted the previous practice of having an alleged victim sign a waiver if he or she did not wish a criminal investigation, to give a statement to the RCMP, or, ultimately, to testify in court. Now, alleged victims indicating that they did not wish a criminal investigation would have their request taken into consideration, but the ultimate decision on the laying of charges and the prosecution of alleged abusers would rest with the police and the Public Prosecution Service. The RCMP would not agree to take a statement only for purposes of compensation.

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[117] Although Chambers referred to 86 files, other reports and documents put the number of files for which there were outstanding offers at about 150: letter dated December 2, 1996 from the Deputy Minister of Justice to the Deputy Minister of Finance; memorandum dated December 13, 1996 from the file assessors to the Deputy Minister of Justice.

[118] There had already been at least one previous case where the Province had reversed its position. An offer to settle for $80,000 had been made to one claimant, who appeared to have accepted. However, the Province declined to pay due to information uncovered after the offer had been made. An application was brought by the claimant for an order in the nature of *mandamus*, but it was later abandoned. The claimant elected to proceed to file review. At file review, the Government's position to offer no compensation was upheld

[119] As indicated in the previous chapter, awards over $10,000 would now be paid over a four-year period. The greater of $10,000 or 20% of the award would be paid in one lump sum payment, and the remainder would be paid over time with interest.

Brown further advised that the RCMP was now prepared to take statements from individuals who had not yet been interviewed or wished to be re-interviewed to provide more detailed disclosure or to add information to their previous statements. However, he stressed that the RCMP was only conducting a criminal investigation and, as such, were interested only in the more serious allegations of sexual and aggravated assaults and assaults causing bodily harm. He assured the lawyers that the RCMP investigators would conduct a professional, non-accusatory interview, take a 'pure version' statement, and ask clarifying questions where required. It was possible that investigators would have to recontact or revisit an individual to clarify certain allegations or to address evidence suggesting that the alleged victim had been deceitful.

On January 22, 1997, the Deputy Minister announced the appointment of Michael Dempster as the Program Director for the Compensation Program. Dempster was an experienced administrator who had reached senior executive rank in the Federal Civil Service before taking early retirement.

In a memorandum dated January 23, 1997, one of the assessors, Averie McNary, requested clarification from Dempster as to how the changes to the Program had altered the fundamental principles and purpose of the Compensation Program embodied in the MOU. She noted that at the assessment stage, where there was ambiguity about the credibility of a claim, the assessors applied the principles of the MOU and gave the benefit of the doubt to the claimant. An alternative approach might entail that assessors require claimants to submit to further questioning, take stances which discouraged pursuit of certain claims, or rigorously cross-examine at file reviews. McNary indicated that the assessors assumed that the original MOU principles remained their 'default' position.

My staff could find no document that directly responded to this memorandum. However, when Mr. Dempster spoke with my staff, he advised that the philosophy during his tenure was to tighten up the Program, but to pay legitimate claims. If what the claimants said could be true, and there was no evidence to refute it, his instructions from the Deputy were to err on the side of the claimant. Dempster was careful to point out that he did not instruct assessors on any individual decisions – they were made by the assessors, usually after conferring with their peers. He believed that the assessors critically analyzed the claims, and made balanced decisions on the basis that there were true abuse victims in the Program, while remaining cognizant of the existence of fraudulent claims.

3. MEETING THE DEADLINE OF APRIL 18, 1997

The most pressing problem for the Compensation Program was trying to meet the announced deadline of April 18, 1997 to respond to the Demands that had been submitted as of December 18, 1996, while also investigating the 21 claims that were slated for file review beginning in February 1997.

On January 16, 1997 Frank Chambers told Amy Parker that contact had been made by telephone with a number of current and former employees respecting pending file reviews. Parker advised Chambers that only written statements could be used in the file reviews. It was concluded that, as there were a large number of witnesses, there was insufficient time to interview them and take written statements for use in the file reviews. The assessors believed that consent to adjourn the scheduled reviews was unlikely to be given. In the result, it was decided that notes of telephone interviews would be provided to the Program office since they might corroborate claims that assessors might otherwise dispute in a file review It was recognized that if the IIU found information to refute a claim, but could not obtain a written statement, the Program office would be unable to rely on the notes of telephone interviews in the file reviews.

Joint meetings were held between the assessors and the IIU investigators. The assessors wanted more details from current and former employees about the institutions where they worked. The assessors also wanted to fully explain to the investigators the difficulties that they faced in the claim process.

Assessors became concerned that they would be unable to meet the April 18th deadline. In an e-mail to Dempster, dated February 21, 1997, Amy Parker noted that there were 181 files to be responded to by April 18th.[120] Parker pointed out that, to date, the assessors had not received any information from IIU on any of them. Further, none of the assessors had started working on the files as they were too busy with file reviews.

In an e-mail to the Compensation Program office, dated February 25, 1997, Chambers noted they all shared concerns about workloads and due dates. He wrote that the 181 files due by April 18th had been assigned to investigators. Former employees were being interviewed by ADR investigators and the results of these interviews would be forwarded with the investigators' final reports. Complaints against current employees were being handled by IIU investigators under Barss. The employees would be asked to respond to those allegations. Once the statements were transcribed (they were generally audiotaped) they would be provided to the Compensation Program office. Chambers further advised that Barss had reviewed some of the complaints against current staff and deemed them "to be of a frivolous nature." As such, the IIU would not be seeking responses from employees on them.

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[120] In other documents, the number of cases to be responded to by April 18, 1997 is given as 192. It is unnecessary for me to resolve which is the correct number.

In an e-mail dated March 13, 1997, Dempster informed the assessors that Chambers had indicated it would be nearly impossible for the IIU to complete its investigations on all of the 192 cases in time for the 120-day deadline. Furthermore, the IIU had worked to a 120-day deadline, rather than an earlier timetable that would leave time for assessors to use the IIU's work. It was clear to Dempster that the "IIU did not have the resources to do the investigations on the volume of cases." The IIU members offered to express their opinion on whether certain low level cases were worth the investigative time and resources it would take to complete them.[121] They contemplated that the Compensation Program office could take unilateral action on those cases, based on existing information. Dempster wrote to the assessors:

> I was convinced by this conversation that he and his group were up to their necks in work and despite promises that have may have been made on their behalf, they cannot deliver. If I receive that in writing, I will inform the Deputy, and have a discussion with Bob on alternative measures.
>
> As for our efforts, I think we can continue to action the cases we can, based on the data we have and if we feel the data is insufficient, we will have to advise counsel that we cannot meet the deadline. Before we do that, we have to advise the Deputy ... Everyone is feeling the strain of the deadlines and we need to be helpful among the units because we all need each other. Remembering that we are going to be successful to the extent we try our best and operate as a unit, we give ourselves the best chance for that success. IIU is probably just as busy as we are, and if we consider the overall program demand we can keep things in perspective.

The Program office provided a Response to 74 Demands on or before April 18, 1997. On all other Demands, the deadline could not be met. The Minister of Justice, the Honourable Alan E. Mitchell,[122] was advised by the Program office of the reasons why:

> The principal reasons for failing to meet this deadline are (1) there has been insufficient time for the IIU to complete investigations on these persons; (2) that compensation for

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[121] There were files where the investigation was stopped by the IIU, sometimes on the basis that the claim value was too low to justify their further involvement. (E-mail from Michael Dempster to Averie McNary, March 24, 1997.) There is no record of the number of claims that fell into this category.

[122] Jay Abbass resigned as Minister of Justice on April 1,1997 and Mr. Mitchell was sworn in as the new Minister on April 2nd.

institutional abuse solicitors and IIU investigators have had to spend significant time preparing and gathering information for file reviews; and (3) the sheer volume of claims. The need for additional staff was identified some time ago and as April 1, 1997, the number of compensation for institutional abuse solicitors was increased to 7; an eighth person to handle the assessment of claims is due to start within 2 weeks.

Letters were sent to counsel for claimants in the applicable cases, advising that the deadline could not be met and of the reason why. (The Deputy Minister had instructed that such a letter be sent.) A form letter had been drafted and circulated following a meeting between the IIU and Program staff. It set out four basic explanations which might be provided for the delay in individual cases. Each file was reviewed to determine which explanation applied. The four reasons for delay which were outlined in the form letter were:

- The claim involves allegations which relate to other matters which are being investigated by the Department, and coordination of investigations is necessary before the completion of the ADR investigation;
- The claim is of a particular severity and there are avenues of investigation open which must be pursued;
- Records requested from external sources have not yet been received or were only recently received and must be reviewed and analyzed;
- The investigation requires contact with the claimant, either by an in-person interview or other means, and that contact has not occurred or has occurred too close to the response date to allow for completion of assessment.

The Government's inability to meet the 120-day deadline met with prompt objection from claimants. Anne Derrick advised Dempster on April 18, 1997 that it was unacceptable that claimants were being required to endure further delays, in some cases seven months after their Demands had been filed, and that the stress and anxiety levels amongst claimants was palpable. She expressed her concern that the delays would be lengthy. She objected, in particular, to delays for further interviews of past employees or for interviews of claimants who had already been interviewed by the IIU. She wrote:

> In the main, my impression of the changed compensation process which was touted by Mr. Abbass as having been improved (a claim rejected, when it was made, by counsel and Survivors) has lost any sensitivity towards Survivors that may have existed at its inception. The relentless re-interviewing, reliance on the absence of corroborative records, disregard

> for the Guidelines of the Memorandum of Understanding and its provisions, spurious bases for reducing or rejecting claims are all operating to discredit this process and further injure and demoralize the very people it was originally designed to help and heal.

In a meeting on July 21, 1997, Barss, Chambers and Dempster revisited the continuing difficulty for the Program in attempting to meet a 120-day deadline. Among the reasons identified were: 1. the view that statements taken by the RCMP statements often were 'pure version' and the IIU believed that almost all of them would have to be redone (in order to ask necessary follow-up questions), 2. release forms had not been obtained in a timely fashion, 3. considerable time was being devoted by the assessors to issues concerning file reviews, the use of polygraphs, etc., and 4. the IIU had begun to take initial statements from claimants. About 287 interviews were scheduled for August 1997, and each required preparation time for IIU investigators and Program staff. This would force existing file investigations to be held in abeyance. Dempster concluded that there were too many factors which were outside the ADR unit's control to be able to comply with the 120-day requirement. The hope was expressed that a simple statement could be formulated in the proposed Guidelines that "file processing is to be completed in a timely manner, once all the required documentation is received in the ADR unit."

4. THE COURT CHALLENGE

In the meantime, work had continued on proposed new Guidelines for the Program. As early as February 11, 1997, Dempster reported to the Deputy Minister of Justice that the Guidelines would soon be ready. On April 3, 1997, Dempster noted in an e-mail to Averie McNary that the Government would not be releasing the Guidelines until the week of April 21, 1997, but that this date could be affected by a pending court challenge.

The challenge referred to was an application for an order compelling the Minister to comply with the terms of the MOU and declaring invalid the new release which claimants were required to sign. The application was filed on April 1, 1997, on behalf of 211 claimants. It was scheduled to be heard on May 14, 1997. The applicants contended that the Minister had a legally enforceable duty, either by custom or by contract, to comply with the terms of the MOU. The Province took the position that the MOU was a compensation framework that set out an *ex gratia* compensation process, and there was therefore nothing to prevent the Province from changing its terms as the need arose.

The Province also took the position that there were many factual matters in dispute. Accordingly, the matter should be dealt with as a conventional lawsuit, rather than as a more simplified application. This position ultimately prevailed. On May 9, 1997, McAdam J. ordered that the application be converted into a conventional action upon the filing of a Statement of Claim. Although the Statement of Claim was filed and the Province filed a Defence, the plaintiffs discontinued the proceeding in June 1997, citing their lack of resources and the time and expense involved in pursuing the litigation.

5. POLYGRAPHS

Despite the end of the court proceeding, there was no immediate move to announce the new Guidelines for the Compensation Program. The reason for the delay was the advent of polygraph testing of employees.

It appears that statements were taken on audiotape from approximately 18 current and 35 former employees between January and April 1997, sometimes more than once. In discussions with my staff, Frank Chambers explained that the employees were frustrated. They had no opportunity to refute allegations and began offering to take polygraph tests. According to Chambers, Barss could see no harm in allowing it: if employees were guilty, they would either not attend for the tests or fail them.

The early polygraph tests were confined to sexual allegations.[123] Chambers indicated that the first group that was tested passed, that is to say, the polygraph operator concluded that they were not deceitful in denying the commission of sexual abuse.

The issues for the Compensation Program office raised by the polygraph tests were identified in a memorandum from Dempster to the Deputy Minister and Barss dated June 9, 1997:

- Are the results of the tests determinative?
- Must we inform legal counsel that future and past claimant statements will be reassessed based on this newly obtained evidence?
- Will the Government cease further payments or take action to recover what has been paid?

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[123] The Province had received opinions from polygraphists that only very few types of allegations of physical abuse could be effectively tested by polygraph examination.

- Will IIU investigators stop an interview with a claimant if an allegation is made against a former or current employee who has already passed the polygraph?

- Will the IIU provide a complete list to the Program office of all named claimants who were mentioned by the polygraphist when he tested each employee?

- Will the Program office inform file reviewers that they have determinative findings in the form of polygraph results?

- Does the IIU have further polygraph testing plans?

Extensive consideration of the use of the polygraph was undertaken by the IIU and the file assessors, and a detailed memorandum was prepared by Barbara Patton, dated June 27, 1997. By that time, 12 employees had been given polygraph tests by Sgt. Mark Hartlan of the Halifax Regional Police Service with respect to allegations of oral sex and intercourse. Sergeant Hartlan concluded that 11 of the 12 employees tested as truthful in their denial of the allegations. The test results had been sent to John Castor at the Canadian Police College in Ottawa for confirmation.

Patton canvassed the admissibility of polygraph results in criminal, civil, family, and administrative proceedings in Canada and in the United States. She stated that in criminal cases polygraph results are inadmissible, not due to fears of inaccuracy, but rather because their admission would be contrary to well-established rules of evidence, disrupt or delay proceedings, and result in a greater degree of uncertainty in the process. However, offers or refusals to submit to a polygraph examination may, in some circumstances, be considered by a trier of fact.

Patton concluded that the Province was not limited in the evidence that could be considered in validating a claim. She felt that the real issue was the weight to be placed on the results. She wrote:

> It is my opinion that there is no reason in law to reject polygraph test results from the ADR process. The ADR process is unique: it is "*sui generis*", governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing."
>
> The case law is only of limited usefulness on the issue of weight. I am of the view that within the context of the ADR program the issue of the weight to be given to the polygraph test conducted by Sgt. Mark Hartlan is not a matter of law but rather of policy. Policy considerations affecting weight could include: (a) the validity of the polygraph as determined by an expert; (b) the disciplinary status of employees who have been polygraphed; (c) the absence of the employees' voice within the MOU; (d) a fiduciary duty to expend monies for a purpose for which they were intended.

The Program office retained a well known expert in the field, Dr. David Raskin, to provide his opinion. In a letter dated July 28, 1997, Patton informed Raskin that, to date, 20 employees had been polygraphed with respect to sexual assault allegations. Nineteen had tested no deceit indicated. One had failed. She noted that Sergeant Hartlan had done the tests and that the results had been confirmed by three other polygraphists, including John Castor of the Canadian Police College. She requested an opinion on the following:

> 1. the standards we should be looking for in a polygrapher;
> 2. whether the methodology used by persons certified as polygraphers by the Canadian Police College can be relied upon to yield a valid polygraph test result;
> 3. how difficult it is for a truthful person to test "no deceit indicated" to questions relating to allegations of sexual assault on a properly conducted polygraph;[124]
> 4. whether a question about the commission of an offence in general (e.g. Did you ever sexually assault any person at the School?) is as valid a testing tool as a question about the commission of a particular offence against a specific person (e.g. Did you ever sexually assault Joe Smith?), or a very specific question such as "Did you ever place your penis in the anus of Joe Smith?"; and
> 5. the conclusion to be drawn where a person against whom an allegation is made, and the person making the allegation, both test "no deceit indicated."

Dr. Raskin responded on August 28, 1997. He wrote that the training offered by the Canadian Police College was the best available, and that the method and techniques practiced by polygraph examiners certified by the College could be relied upon to produce valid polygraph test results. However, he recommended that the examiner should have at least two years field experience. He also suggested that in very important cases, independent review by another qualified examiner would be highly desirable. With respect to the risk of an untruthful person producing a non-deceptive polygraph result, he stated that the scientific evidence indicated such false negative errors would occur in approximately 5% of examinations. It was his opinion that sexual abusers are no different from other offenders with regard to the effectiveness of polygraph techniques. According to him, the only published scientific study to investigate this proposition directly ultimately demonstrated that 100% of the actual perpetrators accused of sexual abuse in the study were correctly detected as deceptive. As for the phrasing of questions, he said:

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[124] Ms. Patton asked how difficult it would be for a *truthful* person to test no deceit indicated, but she may have meant an *un*truthful, or *guilty*, person. Dr. Raskin responded as if she had asked about an untruthful person.

> In general, it is preferable to phrase relevant questions about the alleged offences in terms of specific acts. However, this is not always possible when the allegations are vague, or involve numerous alleged acts or numerous alleged victims. Under such circumstances, it may be necessary to phrase the questions in terms of inclusive categories, such as "sexually assault", "touching for sexual purposes", or "sexual touching" as was done in the examinations conducted in the present investigation. If the latter approach is utilized, it is necessary to discuss the types of acts and the possible victims that would be included under these terms and instruct the suspect that the questions include any and all of the described specific sexual acts. Therefore, it would be important to know the ways in which the categories were discussed and defined with the suspect during the polygraph pretest interview. Review of the tape recordings of the examinations would be helpful in this regard.

Dr. Raskin offered the following further opinion:

> The fact that 19 of 20 accused have passed their polygraph examinations by producing non-deceptive results raises a very strong suspicion that many of the cases involve false allegations. If as many as 10% of non-deceptive results are false negative errors, the probability that 19 of 20 such results are erroneous is vanishingly small. It is essentially zero. I suggest as a procedural requirement that in cases where the accused has obtained a non-deceptive result on a properly administrated and interpreted polygraph examination, the accuser should be expected to undergo a similar examination by a qualified examiner. If the accused has passed and the accuser fails, this should be strong enough evidence to close the matter. Also, knowing that they might be requested to undergo a polygraph examination to substantiate their claims would be expected to serve the strong deterrent to false claims. This would benefit not only the Compensation Program, but would increase the likelihood that bona fide claims would receive the type of attention they deserve.

On July 29, 1997, Anne Derrick wrote to Michael Dempster, advising that she had learned that the Program office was in the process of developing a polygraph policy. She raised detailed concerns about the utility of polygraph testing and the controversy over its validity, and urged the Government to resist any temptation to utilize it in the compensation process.

On behalf of herself and John McKiggan, Derrick later wrote another letter, dated September 10, 1997, requesting input before there was a final formulation of a polygraph policy by the Department of Justice. She understood that the direction likely to be taken would include a requirement that some claimants be polygraphed. She wrote that this would fly in the face of the founding principles of the process and would produce unreliable and, therefore, unfair outcomes.

The Minister of Justice responded on September 23rd, stating that it was not the Department's intention to include a requirement that some claimants be polygraphed, and that he could not envision a process which would force people into taking polygraph tests. He added:

> We must also be mindful of those who feel they have been wrongly accused, many of whom have voluntarily taken a polygraph test in an effort to clear their names. Obviously, we must take every allegation of abuse seriously, and must use every investigative tool at our disposal in this very complex investigation.

6. CLAIMANT INTERVIEWS, DISCLOSURE ISSUES AND MEDICAL RELEASES

In the meantime, the IIU, the Compensation Program and claimants' counsel grappled with issues surrounding interviews and re-interviews of claimants, disclosure of institutional records to claimants, and privacy issues in relation to medical records.

In January 1997, the IIU started videotaping all statements from claimants. This placed a considerable logistical burden on the Compensation Program office, both to produce transcripts and to find the time to view the tapes themselves.[125]

Concerns were raised by Derrick and others about the manner in which the IIU was conducting claimant interviews. In particular, complaints were raised that support persons were not being permitted to attend and that, during the interviews, claimants were being interrogated about the contents of institutional records and asked to explain the denials of abuse by the alleged abusers. In interviews with my staff, IIU investigators denied that they treated claimants unfairly, but acknowledged that they put records, prior statements and other material to claimants, and required explanations for purported discrepancies.

In a letter dated May 5, 1997, Dempster wrote to Derrick addressing some of her concerns. He advised her that it was not his office's intention to restrict a claimant's access to an appropriate support person during the interview process. Further, he indicated that the function of the interview was to obtain the most accurate data possible to assist in making a compensation-related decision and that, therefore, the claimant must be given an opportunity to address any statements by the alleged abusers.

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[125] It was well arguable, however, that videotaped interviews could resolve issues otherwise in dispute. For example, one claim proceeded to file review because the Province maintained that the named employee was not at the institution when the abuse allegedly occurred. At the file review, the claimant denied that he had identified that particular employee; rather, he had been given the employee's name by the Murphys. This explanation was accepted by the file reviewer and compensation was awarded. Apart from some leading questions early in the Stratton investigation, the Murphys denied making any such suggestions to witnesses. Others felt that the Murphys had been suggestive in their questioning of witnesses. This debate could more easily have been resolved, had the Murphy interviews been videotaped.

Chambers wrote to Derrick on August 20,1997:

> IIU investigators are trained professionals. They design and ask questions in a respectful manner which are, in their view, relevant to the claim being investigated. Though it is regrettable that some questions can be uncomfortable to claimants, this is a necessary part of a program requiring the assessment of claims to large sums of money. As you will agree, investigators are attempting to get to the truth of the matter, in as much as this is possible in the parameters of the compensation program. We cannot assume that a claimant is telling the truth. The compensation process provides few mechanisms to allow the Province to challenge claimant's allegations. Where we suspect that an allegation is false or fabricated, it is necessary to probe the alleged events in the interview with relevant questions. The type of questions that you may object to may indeed go to the thing or things alleged to have occurred, and as such are relevant.

The Compensation Program took the position that institutional or other records would not be released prior to IIU interviews, or indeed until a Response was made by the file assessor to a Demand for compensation. The Program's position was reflected in a letter, dated June 17, 1997, from an assessor, Leanne Hayes, to counsel for a claimant. She pointed out that the purpose of the investigation was to acquire information untainted by outside influences, including institutional records:

> Some counsel have expressed concerns regarding cross-examination by IIU investigators of the claimants based upon the institutional records, and that this is inherently unfair. I note that during the RCMP interview, the RCMP investigator clearly had access to records or information upon which he based certain lines of questioning ... It seems to me that if the RCMP are entitled to conduct their investigation without prior release of documents or sources of information to the claimant (or in that case, the complainant/victim), that the Province should be offered the same opportunity to complete investigation without prior release of "evidence."

On July 13, 1997, the IIU imposed a requirement that claimants sign blanket authorizations for the release of medical records, so they could be obtained before a claimant was interviewed. The IIU did not consult with the Program office about the need for medical records on a case-by-case basis. Indeed, IIU investigators might not even be aware of the substance of a claim before they had taken a statement from the claimant. Claimants' counsel objected to this procedure, which did not limit the requests for medical information to situations where the information might be relevant to the claim.

As I noted earlier in this Report, the Murphys had been retained to take statements from claimants both before and during the operation of the Compensation Program. Many claimants gave more than one statement to the Murphys. It was common in re-interviews for new allegations of abuse to be made.[126] This was not unique to re-interviews done by the Murphys. New or different allegations also surfaced in subsequent interviews conducted by the IIU and the RCMP.[127]

In discussions with my staff, the Murphys expressed some discomfort with new statements from claimants which revealed more serious or different allegations where the new statements were taken after the compensation grid was published. They also expressed discomfort over such statements taken following therapy sessions. However, their instructions were not to question or challenge claimants, but to record accurately the claimants' experiences. In the files reviewed by my staff, where the IIU or RCMP investigators re-interviewed claimants, and differences surfaced from previous accounts, the claimants were asked to explain the differences.

In a letter to Dempster of July 29, 1997, Ms. Derrick pointed out that the IIU were requesting re-interviews of her clients in cases where they had not even looked at the videos of statements taken by the RCMP. She reflected that this seemed contrary to the announced intention by the Government to avoid a multiplicity of interviews.

In a letter dated September 23, 1997, the Compensation Program office announced that, effective October 1, 1997, "all Statements will be taken only by the Internal Investigation Unit." The RCMP would continue to conduct interviews, but solely for the purpose of their criminal investigation. RCMP statements taken prior to October 1st could still be used for compensation purposes, but an IIU statement might be required to complete the investigation.

7. CALLS FOR A PUBLIC INQUIRY

The various complaints emanating from both claimants and employees generated calls for a public inquiry the reports of institutional abuse. Some employees, some claimants, the NSGEU and the media all promoted, to varying degrees, the need for such an inquiry. On July 20, 1997, the Minister of Justice requested that a briefing note be prepared for the Premier addressing what such an inquiry's mandate might be, whether it would get meaningful answers that could not be obtained from the current process, and how it would affect the ADR process and Operation HOPE.

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[126] I understand that, in some instances, there is a dispute as to whether the allegations were truly new or simply more detailed.

[127] Indeed, new allegations arose even at the file review stage, which sometimes led to an adjournment of the review for further investigation.

Barss, who was then Acting Deputy Minister of Justice, forwarded a briefing note to the Premier's office on July 21, 1997. The note raised concerns over the impact a public inquiry would have on the RCMP investigation and the considerable stress it would place on current employees. It was pointed out that the Stratton investigation had found that abuse occurred in three institutions, and that nothing was done although the abuse was known. It was believed that a public inquiry would probably come to the same conclusions, and would likely recommend that compensation and an apology be provided to the victims, that the perpetrators be investigated and brought to justice, and that steps be taken to ensure that this could not occur again. These steps had already been taken by the Government. The note concluded:

> Though an inquiry would provide a reprieve for government, the questions of compensation, the RCMP investigation and the internal investigation would still be left at the end of the day. In our view, we may accomplish the same objective by having the IIU complete a comprehensive report on the three institutions. Upon completion of their investigation, the IIU can provide a report that outlines the extent of abuse, knowledge of abuse, analysis of the process which allowed the abuse to occur, accountability mechanisms, and recommendations to prevent any recurrence. The report would be for public consumption. We would announce our intentions to do so shortly, which would quell the calls for a public inquiry, and allow the process of compensation as well as the investigations to continue.

Another briefing note on the issue, dated August 20, 1997, was prepared for the Premier by Michael Dempster. Dempster recommended that there not be a public inquiry. Instead, he suggested that the Compensation Program continue, but with significant changes to give the Province greater protection from fraudulent claims, in the context of a process that respected the privacy of claimants and employees and allowed for further improvements. The Premier endorsed the idea that proposals be put to the Priorities & Planning Secretariat ("P&P") for an improved compensation process.

On September 10, 1997, the Minister of Justice submitted a memorandum to P&P recommending that calls for a public inquiry continue to be rejected, and that the Compensation Program continue, but with significant changes to give the Province greater protection against fraudulent claims. On September 12th, Dempster advised the assessors and other officials to defer further file reviews pending direction from P&P.

On September 23rd, P&P approved the Minister's recommendation. He was directed to return to P&P with the specifics of new Compensation Program Guidelines. The decision by the Government was announced by the Premier.

8. CONCERNS OVER FRAUD

The July 21st briefing note from Barss also stated that intelligence coming from correctional services in federal and provincial institutions indicated that inmates were sharing information on which employees to name as perpetrators. The concern was raised within the Department of Justice that a significant number of claims could be fraudulent. Changes to the Program were being examined to ensure that the Program was compensating only legitimate victims of abuse.

The note also cited a recent example where the Program had denied a claim because the institutional records showed that the alleged abuser was not employed at Shelburne when the alleged abuse occurred. However, the file reviewer concluded that it was not proven that the employee was not there and made a substantial award in favour of the claimant. The note stated:

> No one disputes the fact there was widespread abuse at these institutions, but we must be diligent in our efforts to ensure only those who were truly abused receive compensation, and those who are wrongly accused are cleared as quickly as possible.

By this time, the IIU had put together a list of 173 persons who, in their view, had made fraudulent claims for compensation. There was a variety of reasons why a file was placed on this list, including:

- The claimant made an allegation of sexual abuse against an employee who took and passed a polygraph test;
- The claimant refused to cooperate with the RCMP;
- Information was obtained from informants or through other intelligence showing that the claimant had lied about the allegation;
- The claimant demanded a large amount of money, was offered less and accepted;
- The IIU investigation revealed a lack of truthfulness. For example, the claimant alleged abuse by a counsellor who was not there at the time indicated, or named others as witnesses who were either not present or disputed having seen the abuse.

I later comment on the inclusion of some of these items on this list.

9. FILE REVIEWS BEFORE THE GUIDELINES

The changes announced on December 6, 1996, did not purport to change either the basic principles set out in the MOU or the provisions that governed file assessment and file review. It was clear that there was a wide discrepancy in the information available to file assessors, and hence, for any subsequent file review process. This was due, in large measure, to the logistical impossibility of the IIU investigating all the claims.

Approximately 100 file review decisions were rendered between May and November 1997. Given the number of file reviewers and decisions, one must be careful not to over-generalize about the approaches taken by reviewers. However, I describe several decisions below in order to highlight some of the variations in approach taken by reviewers.

Some file reviewers considered their role to be fairly limited. One wrote, in a June 1997 decision:

> I have come to the conclusion that my role is fairly limited. The MOU provides little suggestion that a file reviewer was to delve into questions of credibility. I take from the MOU that the drift of my role is to hear the allegations and to fit them into the category set forth and affix the appropriate compensation based on that.
>
> Obviously if some allegations could be clearly demonstrated to be untrue, impossible, or strain the bounds of credibility, they would have to be discounted in my decision. Short of that, however, there is little room to test the allegations and the MOU did not apparently contemplate me doing so.

A file review was held on July 10, 1997, with the claimant, his counsel, and an assessor present. The claimant made three allegations of physical abuse and a single allegation of sexual abuse. The physical abuse allegations were directed against three employees. The allegation of sexual abuse was of fondling by an unidentified individual. The file reviewer had before her the claimant's Murphy statement, his videotaped interview with the IIU, and a review of the philosophy and policies on the use of force applicable in Shelburne from 1970 to 1995. The only available documents were employee shift logs for the 45-day period that the claimant was at Shelburne.

In relation to the sexual abuse allegation, the file reviewer stated:

> I take the position that since the allegation was made and the Province is unable to provide any countering evidence that the incident did not occur and has not otherwise impeached [claimant's] credibility that I am compelled to accept the truth of his allegation.

As for the allegations of physical abuse, the file reviewer noted that the Province accepted as credible the claimant's account respecting one allegation and had made no specific comment respecting the second. The reviewer accepted that both of these incidents occurred as alleged by the claimant. With respect to the third allegation, the Province accepted that the claimant was involved in an altercation with the named employee, but disputed its extent and the resulting injury. The file reviewer accepted that the altercation did result in physical injury, albeit not a long-term one. She concluded that the claimant suffered minor sexual and minor physical abuse and awarded $30,000, plus a counselling allowance of $5,000. It appears that the Province's positions were taken without any information as to what the employees had to say.

The same file reviewer conducted a review on September 19, 1997, where a claimant made numerous allegations of physical and sexual abuse. In her decision, she reflected that she had asked questions of the claimant to clarify issues and evidence, and that the lawyer representing the Province had been given the opportunity to cross-examine the claimant. She wrote:

> I have an obligation under this alternate dispute process to make a determination of [claimant's] credibility and to ascertain, within the parameters of the guidelines set out under Schedule "C" of the MOU, the classifications of sexual and/or physical abuse suffered by [claimant]. I concur with Mr. McKiggan's submission that my determination is to be made out on a balance of probabilities, more particular, is it more likely than not that claimant] was abused in the manner and by the persons as stated in his allegations.

The file reviewer concluded that she did not necessarily accept each allegation of physical abuse, nor that it was chronic or that it resulted in serious physical trauma. She nonetheless found that the claimant did suffer a degree of physical abuse within the minor physical category, and awarded $5,000. With respect to alleged sexual abuse, she found the allegations disturbing, but the very general terms in which the claimant described the abuse and the inconsistencies between his various statements led her to conclude that, on the balance of probabilities, the claimant did not suffer the sexual abuse alleged.

In another decision, dated August 26, 1997, a file reviewer wrestled with the approach to be taken under the MOU where the Province disputed the alleged abuse. This was the first time that the issue had arisen for this reviewer. After noting that the MOU was silent on the issue, he stated:

> Nowhere, however, in any of these Articles [the MOU], is the standard of proof or the location of the burden of proof mentioned. The matter is therefore at large. On this basis, I know of only one way in which the resolution of a dispute about the existence or non-existence of any past event can occur. At the end of the day, there must be a decision, one way or the other, as to whether its occurrence is more probable than not. That is all the balance of probabilities test requires, but it cannot require anything less. This is so because

> the only other possible conclusion is that it is more likely than *not* that the event did not occur. No series of statements believed to be false, more likely than not, could ever be the basis for compensation under the MOU.
>
> (Emphasis in the original.)

The file reviewer also concluded that although the burden was on the claimant, the MOU intended that the claimant's statement should be the foundation document for the claim, and thus provide a *prima facie* basis for compensation. In other words, if nothing else was presented and the allegations went uncontradicted by other evidence, compensable abuse was proven and the matter became one of categorization and compensation.

The file reviewer accepted as fact the 'findings' set out in the Stratton Report and the allegations set out in the Survivors' Volume of Statements. In relation to the claimant's allegations of physical abuse, he commented:

> There is first of all nothing inherently improbable about what was related. The *Stratton Report* and the *Survivors' Volume of Statements* are distressingly replete with the violent responses by staff to trivial departures from routine, and with the use of force as a controlling and intimidating behaviour.

With respect to the claimant's allegations of sexual abuse, the file assessor submitted that the allegations were improbable. The reviewer again relied on the Stratton Report and the Survivors' Volume of Statements:

> Counsel for the Province also took the position that because there were numerous other boys in the cottage, the assaults are unlikely to have occurred, because the staff member alleged to have been involved would have been risking discovery. Frankly, having read the *Stratton Report* and the *Survivors' Volume of Statements*, I give this argument very little weight. It is clear from the written material that there was a culture of abuse and concealment existing in this school. Abuse was carried out with impunity and usually covered up if observed. Fear of discovery would certainly exist, but we now know from the *Stratton Report* that the likelihood of anything untoward happening as a result of any such discovery was vanishingly small.
>
> We also know from the many survivors' statements that the resident boys were conditioned to obedience and silence in the face of abuse by intimidation and physical punishment by staff members. Attacks on residents were almost always accompanied by an admonition to remain silent or face retaliation and punishment. In the result, I believe staff inclined this way pretty much did what they wanted, when they wanted, with little fear of either discovery, particularly by the residents, or of punishment.
>
> .....

> We have to look at the type of proof of which the events are capable, and at the informing context conveyed by the *Stratton Report* and the *Survivors' Volume of Statements*.

10. NOVEMBER 6, 1997, GUIDELINES

A detailed memorandum containing the proposed new Guidelines for the Compensation Program was approved by P&P on October 21, 1997, and by Cabinet on October 24, 1997. On November 6th, the Government released them to the public, as the "Compensation for Institutional Abuse Program Guidelines." They were to provide the framework for the continuing Program and appeared to replace the MOU. They were made without the prior consent or approval of claimants' counsel.

When the Government announced its further "adjustments" to the Program, they were said to "help ensure that only legitimate victims receive compensation for abuse." The Minister of Justice, the Honourable Alan Mitchell, stated:

> We cannot forget for a moment that there are real victims of abuse. However, we cannot allow anyone to defraud this program. It simply isn't fair to the true victims of abuse, and to the taxpayers of this province. These changes allow us to move forward, and to protect the interests of those who truly deserve to be compensated.

The Guidelines have many features that distinguish them from the original MOU. Some of these features were already reflected in the earlier changes made to the Program when it was reinstated. Here are the key components:

- The lengthy preamble to the MOU is absent. As noted before, the preamble contained the principles and fundamental purposes associated with the Compensation Program, including the acknowledgement of moral responsibility for the abuse perpetrated, condoned or directed by employees, the assistance of survivors with the healing process, and the affirmation to the survivors that they were not responsible for their own abuse.

- The Guidelines may be revised by the Province of Nova Scotia as the need arises. They are, by their terms, subject to unilateral change.

- The term "claimant" is substituted in the Guidelines for "survivor," which was used in the MOU to describe an individual who alleges that he or she was a victim of physical and/or sexual abuse.

- The definition of "physical abuse" is similar to that given in the MOU, except that the Guidelines specifically provide that physical abuse does not include an act that would be included under section 43 (or its predecessor sections) of the *Criminal Code* (which justifies the use of reasonable force by certain persons for purposes of correction), or the reasonable use of the strap by way of correction where its use was a common disciplinary practice in the Nova Scotia public schools at the time the incident described took place.

- "Sexual interference," which under the MOU could include "inappropriate watching or staring, comments and sexual intimidation," is now defined to mean "touching, watching, comments or intimidation, where such acts are for a sexual purpose."

- A specific provision that the Program does not provide compensation for 1. abuse perpetrated by residents upon residents, 2. abuse perpetrated by individuals who were not employees, 3. negligence, or 4. as earlier reflected in the MOU, the psychological consequences of physical or sexual abuse.

- As of the effective date of the Guidelines, to be eligible for the Program, a claimant must have submitted a Demand by December 18, 1996, or notice of an intention to file a Demand by that date and a Demand by July 31, 1998, and executed medical releases by April 1, 1998. In addition, where a claimant had not yet given a statement (defined as an account detailing physical and/or sexual abuse alleged as having occurred at one or more of the subject institutions taken by Facts Probe Inc., the police or the IIU), the claimant had to at least contact the IIU by February 27, 1998, to schedule an interview.

- At any stage in the Program, the claimant may be requested to give a further statement to the IIU. Refusal to do so would result in the temporary suspension of the investigation.

- A claimant will be considered to have withdrawn from the Program and become ineligible for compensation where he or she has not provided a Demand, an executed medical release and contacted the IIU by the required dates, or has not provided a further statement within 60 days of a request for one.

- The Province shall only access a claimant's medical and MSI or other provincial health program records where they are needed to evaluate the Demand made.

- As of October 1, 1997, all statements will be taken by the IIU only. Prior statements given to Facts Probe Inc. or the RCMP will continue to be accepted for the purposes of filing a Demand.

- Procedures respecting the statement taking process are set out in Schedule D to the Guidelines. All statements are to be videotaped and to be taken in "pure version format" (i.e., through an open-ended process that encourages the fullest account in the witness's own words without pointed questioning), although a question and answer session may follow. The claimant shall be sworn or affirmed, cautioned that false allegations constitute offences and asked if the statement is being voluntarily given. The claimant's counsel may be present, as well as one additional invitee, such as a therapist, counsellor, spiritual advisor or family member, but the invitee cannot comment, offer opinions, counsel or lead the claimant. An investigator may terminate or suspend an interview where of the opinion that the claimant is being coached or led or where the interview is otherwise interrupted. Copies of "photo-ID's" or "yearbooks," sometimes shown to a claimant during statement taking, will not be provided to the claimant or his or her counsel.

- Where the claimant makes a new allegation subsequent to filing a Demand (meaning an allegation different from one already contained in a statement, such as the naming of an employee not previously identified as an abuser, a change in the circumstances or time associated with an assault, or an increase in the frequency or severity of a particular assault), it shall be investigated and only responded to after the IIU has completed the investigation.

- Other claimants' statements may not be incorporated within a claimant's Demand or submitted separately for use in assessing or reviewing claims unless the IIU has had an opportunity to investigate the allegations in those statements.

- Any statement provided by a claimant may be used by the Province, without notice to the claimant, for such purposes as discipline proceedings, the investigation or prosecution of an offence, a report of child abuse to the Department of Community Services and any investigation undertaken by that Department or a child protection agency, civil litigation by or against the Province or a child protection agency, and the identification of potential witnesses for the investigation and validation of claims.

- In determining the validity of the Demand, the Province is to consider the claimant's statement(s), institutional records, the employee's employment records and, where available, polygraph test results, the claimant's medical records and other relevant information. The opinion of a polygrapher, certified by the Canadian Police College, is admissible in assessing credibility. Where such evidence exists, the Province shall notify the claimant of this evidence prior to providing its Response, include the opinion with its Response, and, at the claimant's option, arrange for a polygraph test to be administered to the claimant within 30 days of notification. Any results so obtained shall be made known to both the claimant and the Province and become part of the evidence on which the Response is based. The claimant's institutional documents shall also be provided with the Response.

- As a condition for making an offer of compensation, the Province must be satisfied on a balance of probabilities that the abuse described by the claimant occurred. Where one groundless, implausible or deceitful allegation is made, the Province will draw an adverse inference in considering other allegations.

- The claimant may expect a Response within seven months of submitting a Demand. However, complex cases or delays in obtaining a claimant's statement, medical releases or records may result in a longer response time.

- Claimants have up to 12 months to accept the Province's offer of compensation unless it is earlier revoked. A release must be provided when the offer is accepted in accordance with Schedule E to the Guidelines before payment may be made. Schedule E, the release, reflects the claimant's understanding of a number of the Guidelines' provisions, as well as containing the terms of release. Unlike the release contained in the original MOU, the release under the Guidelines does not specifically provide that the releaser remains entitled to sue any employee who committed abuse against the releaser. It does specifically reflect the claimant's understanding that his or her statement and other submitted materials may be investigated for accuracy in the future and, if civil or criminal action is commenced respecting suspected false statements or evidence, payments will stop until proceedings are fully resolved in the claimant's favour. The claimant also promises not to disclose the amount of compensation received except to professional advisors and therapists and family. (The original MOU permitted disclosure to care givers and other survivors).

- A notice of file review must be filed within six months of receiving a Response. All file reviews will now proceed by way of written submissions only. The claimant's submissions are to be provided within 30 days of the notice. The Province's submissions are to follow within 30 days, providing reasons for its position along with any new evidence. The claimant may reply in writing within 15 days. Where a new allegation is made in the claimant's submissions, the file review process will end and a new Demand and statement must be provided and followed up in similar fashion to an original Demand.

- The claimant and Province are to provide the file reviewer with their submissions, the Demand and Response, and related documents. The parties shall provide each other with a list of documents so provided and exchange any documents not already exchanged. File reviewers shall not refuse a reasonable request to extend the submission deadline.

- File reviewers are to be lawyers with administrative law, ADR or other relevant experience. They are to be assigned by rota. The list of file reviewers remains the same.

- As a condition for making an award, the claimant must satisfy the reviewer on a balance of probabilities that the alleged abuse occurred. The reviewer may consider the same categories of materials/evidence which can be considered by the Province in assessing the Demand, including polygraph evidence.

- File reviewers are to provide written reasons within 45 days (rather than the 30 days contained in the MOU). There is no longer any provision reducing the file reviewer's fees for every day the decision is late. The award given by a reviewer is to be paid within 30 days (rather than the 20 days contained in the MOU).

- Awards over $10,000 are to be paid over a four-year period, with the greater of $10,000 or 20% of the award in one lump sum payment, and the remainder paid over time with interest. (There are detailed payment provisions.) Where the Province commences civil or criminal proceedings against a claimant respecting this Program, the claimant's payments must be stopped. A "catch up" payment is to be made, with interest, where the outcome of those proceedings is in the claimant's favour.

- The interim and long-term counselling provisions are similar to those contained in the original MOU. In the Guidelines, the Family Services Association is specifically designated as service arranger in connection with interim psychological counselling. Further, the $5,000 for interim psychological counselling may be exceeded and later deducted from a long-term counselling award. A long-term counselling allotment may now be applied to employment upgrading, educational programs, tattoo removal, dental work, or any combination of these. Long-term counselling allotments are only available for five years from the award date.

- Where an award is made after the effective date of the Guidelines, the maximum hours billable to the Government for legal services respecting a compensation claim are increased from 10 to 15 hours.

The complete Guidelines are reproduced as Appendix "G".

11. AUDIT OF RANDOMLY SELECTED CLAIM FILES

Of the 90 randomly selected files reviewed, 18 were processed in the period from December 1996 to November 6, 1997. In these 18 files, allegations were made against 36 former and current employees, and nine unnamed or unknown employees. Our review showed that there was some employee input in nine files. As was the norm, in these files the claimants made allegations against a number of different employees; however, in none were *all* of the alleged abusers interviewed. Those employees who were interviewed denied the allegations. In the remaining nine files there was no employee input at all.[128] Four of the named employees were unavailable to be interviewed.[129]

All of the 18 files that we reviewed contained at least one Murphy statement. In 11, either the IIU or the RCMP had also taken a statement from the claimant. Fifteen of the files were governed by the requirement to respond within 120 days. Eleven were not responded to within that time period.

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[128] In one of these files, the claimant only referred to unnamed or unknown alleged abusers. In another, the claimant named Patrick MacDougall. In the remaining seven, multiple former or current employees were named. These employees were available to be interviewed, but there is no record that they were ever asked to provide a statement.

[129] From the records available to my staff, three of the named former employees were deceased and one was incapacitated by Alzheimer's Disease

The IIU provided a report in 15 of the 18 files. In the sixteenth, it supplied the institutional records only. In the remaining two, a memorandum was sent stating that (as discussed between Dempster and Barss) they were files in which the investigation was "suspended in the interest of: low level of abuse; death of employees; cost effectiveness, time efficiency and specific inaccuracies."

In the reports, the IIU would refer to their findings using the following language:

- The investigator notes that there is no corroborative evidence or witness statements in relation to this matter ...;
- [The employee] has been interviewed, he denied this allegation ...; or
- [The employee] will not be interviewed due to minor nature of this allegation.

In the IIU Investigator Conclusion column, the investigators would use this language:

- The investigator cannot confirm or dispute this allegation;
- The allegations are vague, unsubstantiated by physical evidence and have been denied by the employees contacted;
- The claimant does not know the identity of the abuser and there are no specific details ... There is little credibility to the allegations; or
- There is insufficient evidence regarding this allegation for a conclusion to be drawn based on the balance of probabilities.

Of the Demands made in the 18 files that we reviewed, 12 requested compensation of $50,000 to $100,000, four were in the range of $40,000 to $45,000, and the other two were for $20,000 and $5,000, respectively. None of the Demands were accepted as presented. In two, the assessor offered no compensation. In one, the assessor did not respond within the 120-day time period for a Response and the claimant was allowed to go to file review without a Response from the Government. In all others, offers of compensation were made.

In four files, the amount demanded was $100,000. All four cases went to file review. The outcomes of these cases can be summarized as follows:

- In the first case, the assessor offered no compensation. The file reviewer awarded $55,000;

- In the second case, the assessor also offered no compensation. The file reviewer awarded $17,000 for physical abuse, but upheld the denial of compensation for the alleged sexual abuse;

- In the third case, the assessor offered $5,000 compensation. The file reviewer awarded $50,000;

- In the last case, the assessor offered $52,000. The matter was scheduled to proceed to file review, but was settled in advance for $85,000.

Overall, nine of the 18 files we reviewed from this phase of the Program went to file review. Three were settled prior to being heard. The other six were completed by the decision of a file reviewer. In five of those six cases, the claimants exercised their option to appear personally to tell their stories.[130] In only two of the six cases, was the alleged abuser interviewed, and both denied the allegations. However, in another, there was some input from witnesses (five former and current employees) respecting the procedure in the Special Attention Unit (the segregation unit).

The following claim files are illustrative of the assessment and file review process during this phase of the Compensation Program.

C.G., a former resident of the Nova Scotia Youth Training Centre, made a Demand for $70,000 compensation under category 3 (severe sexual and minor physical abuse). She alleged that she was sexually abused by two male staff members, identifying one by name, and the other by a description. She said that both worked with the boys' group. She also alleged that she was physically abused by female staff, but could only recall the name of one staff member.

In this case, the IIU contacted the named male alleged abuser, who gave a written statement in which he advised that he did not supervise any of the girls and denied ever touching the claimant in any way. The IIU investigator concluded that he could not "confirm or dispute" the allegation.

The Province's Response was not provided by the due date of April 18, 1997. Claimant's counsel sent a letter to the assessor, saying that because the Province missed the deadline, he wished to proceed to file review. The assessor responded on May 28, 1997 as follows:

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[130] In the sixth case, the claimant requested that the file review be conducted as a 'paper review' of the materials submitted to the file reviewer.

> In this matter, assessment of the situation is especially difficult and delicate, because [C.G.], like many former residents of the Nova Scotia Youth Training Centre, faces multiple difficulties in both her history and current functioning. She has had a very troubled past, there is no doubt. I have carefully reviewed the institutional records, the Murphy Statement, the video, and medical records. I have considered the comments of Justice Stratton in relation to this facility, in particular the conclusions at page 85 to 87 of his report.
>
> This Program sets out a low proof process for establishing that abuse has occurred. After careful consideration, it is the Province's position that there is insufficient material, (or sufficient uncertainty, to put it another way) to meet the standards of the process. The factors which contribute to this conclusion are the lack of detail and specificity in the statement and the reinterview (especially as regards sexual abuse); the content of the institutional records and that [C.G.] appears to have little actual recall of the events alleged.

The file review hearing was held on June 17, 1997. C.G. was present, along with her counsel and the file assessor. The file reviewer released his one-page decision on June 30,1997. He concluded as follows:

> [Claimant's counsel] presented this as a category 3 claim – "severe sexual and minor physical" – and sought compensation of $70,000. [The assessor] was of the opinion that the factual allegations contained in the statement were too vague and uncertain to justify an offer by the Province.
>
> After concluding the review hearing, [assessor] appeared to accept the contention that [C.G.] had been raped on one occasion. I believe that this incident did occur. This would justify a finding of "medium sexual" abuse. I find the allegations of slapping are too vague to accept and on the totality of the evidence I am not prepared to make a finding of any type of physical abuse.
>
> I find that [C.G.] should be compensated under category 8 in the amount of $30,000.00, plus a counselling allotment of $7,500.00.

There is no indication in the file material that the statement from the former employee was submitted to the file reviewer.

J.H., a former resident of the Nova Scotia Youth Training Centre, submitted a Demand on May 28, 1996, for $100,000 compensation under category 2 (severe sexual and medium physical abuse). The allegations were against a named employee, X, and two unnamed kitchen staff. The file assessor gave her Response on August 8, 1996, denying the claim, at least in part because the named employee was not at the Centre when the claimant was there.

The claimant opted to go to file review. It was held on February 6, 1997. Present were J.H., her counsel, the file assessor, and Michael Dempster. Prior to the review, the assessor obtained some new information which suggested that there was an employee who may or may not have gone by the name X at the Centre at the relevant time.

The file reviewer released his decision on March 4, 1997. He noted that during the hearing the claimant testified and related incidents as best as she could, and that she was examined by her own lawyer and "cross-examined" by the file assessor. He also remarked that the parties were satisfied that they had full disclosure, there was a full cross-examination of the claimant, and "there were no other witnesses to testify." He commented that prior to the hearing "the Crown" conceded that there was a Miss or Mrs. X who worked at the school at the relevant times, and consequently this issue was removed from consideration at the hearing. Nevertheless, he noted that the assessor continued to question the allegations on the basis that the claimant's story was disjointed, convoluted and simply too difficult to understand and believe.

The file reviewer expressed his findings as follows:

> I have had the opportunity of listening to [J.H.] and listening to what both [her counsel] and the Crown have had to say. The Crown suggested that this is a difficult case for them and I certainly agree that it is a difficult case all around. I have no question that the [J.H.] has suffered a very troubled life, some of which can be traced to her stay at the school, but a lot of which can be traced to her circumstances in life.
>
> I agree with [claimant's counsel] suggestion that it would be wrong to simply discount her story because it is disjointed and somewhat difficult to follow. I agree with the Crown's suggestion that there are many discrepancies and inconsistencies in her story and some of it is difficult to believe. I also believe that some of what she feels happened can be attributed to a difficult upbringing and the School's attempts to handle her behaviour. I read her statements and find that there are indications of someone who has significant psychological problems and indeed it is extremely difficult to ascertain what is fact and what is fiction and furthermore, if we accept what she says, it is difficult to itemize what her allegations are, particularly as to time, place and frequency.
>
> That being said, I don't believe that [J.H.] should be penalized simply because she is of low intelligence or because she cannot put together her story as well as other people of greater intelligence.
>
> It is my finding that in the absence of any evidence to the contrary, [J.H.] was abused at the school. I find that she was abused by [employee X] and others and this consisted of some physical abuse and that it also consisted of sexual abuse in the form of oral sex, fondling, and on certain occasions, the insertion of certain articles in her vagina. I say this because [J.H.] says it happened and I have no evidence to contradict what she says. She strikes me as an individual who was preyed upon by workers in this school and others that are presently part of this compensation program.

The file reviewer put the claim in the mid-range of category 6 (medium physical and medium sexual) and awarded $55,000 in compensation.

D.M., a former resident of Shelburne, submitted a Demand on June 17, 1996, for compensation under category 7 (medium sexual and minor physical abuse) in the amount of $40,000. He gave a statement to the Murphys in September 1995, in which he alleged that employee A sexually abused him on three separate occasions. He also claimed that two other counsellors punched and kicked him. His claim in relation to sexual abuse indicated:

> [Employee A] caught my client stealing cigarettes several times. The counsellor brought him to the office, and made him remove all of his clothes, including his underwear. [Employee A] would fondle my client's genital area. [D.M.] describes these incidents as follows: "It was only for a minute or so but as I look back at it now, this man violated me."

The file assessor accepted that a strip search occurred on one occasion, but asserted that such searches were necessary. She did not accept that the strip search was a sexual assault. She assessed the claim at $1,000 for minor physical abuse, plus the counselling allotment of $5,000 available for educational, psychological or financial purposes.

D.M. elected to go to file review. He provided another statement to the Murphys in November 1996, this time alleging that the sexual abuse by employee A consisted of masturbation and anal intercourse. A new Demand was made for compensation under category 3 (severe sexual and minor physical abuse) in the amount of $70,000.

The IIU submitted reports to the assessor in advance of the scheduled file review date. Although no written statements appear to have been taken, the IIU investigator reported that employee A was contacted in relation to the allegation, denied any improper actions, and offered to undergo a polygraph examination. In relation to one allegation of physical abuse, D.M. named employee B. The investigator reported that there was no record of anyone by that name working at Shelburne at the time D.M. was a resident, and that other counsellors who were present in Shelburne at the relevant time could not recall an employee by that name. D.M. advised the IIU that he was positive about the name. The investigator contemplated that D.M. might be confused, and looked at the records of another employee with a similar name who was there at the same time as D.M. The investigator reported that that employee was not a counsellor for D.M.

The case was heard on March 17, 1997, with D.M., his counsel and the file assessor in attendance. The file reviewer released his decision on March 19,1997. He commented that the Government's position had changed: "Ms. [assessor] is now prepared to accept on behalf of the

Crown that [D.M.] had anal intercourse performed on him by [employee A]."[131] However, the assessor maintained that the claimant had considerably changed his story and exaggerated it. The reviewer said he had considerable difficulty with D.M.'s recollection. He concluded that even if he accepted everything D.M. said, he was unable to find with any degree of certainty that D.M. was sexually abused more than three or four times. The reviewer found that the physical abuse claimed was minor, placed the total claim in category 7 (medium sexual and minor physical abuse) and awarded $47,500.[132] There is no reference in the decision to the fact that there was no employee by the name of B at Shelburne at the relevant time.[133]

J.O. was a former resident of Shelburne and the Nova Scotia Residential Centre ("NSRC"). He submitted a Demand on November 20, 1996, requesting compensation under category 2 (severe sexual and medium physical abuse) in the amount of $100,000. The Demand was based on a statement given by J.O. to the Murphys on April 11, 1996. He alleged that he had been severely sexually abused by employee A, and that it had occurred in the "hole." He claimed that he had spent a month or month-and-a-half in the "hole" and that employee A had forced him to perform oral and anal sex at least 25 times. J.O. also alleged that he had been physically abused at both institutions by six different employees.

According to the reports provided by the IIU to the file assessor, the alleged sexual abuser was deceased. However, none of the alleged physical abusers were interviewed. The reason given was that, for the most part, the allegations were "low level in nature."

There were numerous reports from NSRC that J.O. had to be restrained by staff due to what was referred to as unacceptable behaviour, and that he was considered to be dangerous to himself and to others. The IIU investigator considered J.O.'s allegations to be unfounded. He noted that while J.O. alleged he spent up to one-and-a-half months in the "hole" (the Special Attention Unit, or "SAU"), institutional records showed that he spent only two nights there for two separate incidents, and that on both occasions employee A did not work in the unit.

The file assessor provided her Response on May 2, 1997, providing detailed reasons why she was unable to offer compensation for the alleged sexual or physical abuse.

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[131] There is no explanation in the file materials for this change of position.

[132] The reviewer noted that the assessor suggested the claim fall somewhere in the $40,000 to $50,000 range.

[133] In fairness, it would appear that the file assessor placed no significance on the fact that D.M. named B as his abuser, believing that D.M. may have got the name wrong.

J.O. elected to proceed to file review. The review commenced on September 25, 1997, with J.O. present, along with his counsel and the file assessor. It did not conclude that day and was to continue on October 15, 1997. However, the file assessor took the position that J.O. made further allegations during the file review and requested that he be interviewed by the IIU concerning them. The file review was ultimately concluded on January 21, 1998. In the meantime, the IIU not only re-interviewed J.O., but also took statements from a number of employees who worked the shifts when J.O. was placed in the SAU.

The file reviewer released his decision on February 19, 1998. In his decision, the reviewer noted the file assessor's position that J.O.'s allegations lacked credibility. He also noted that at the hearing of January 21, 1998, J.O. amended his demand from category 2 to that of category 6 (medium physical and medium sexual abuse). The file reviewer concluded:

> After carefully reviewing the Survivors' Volume of Statements, the MOU, two videotaped interviews of [J.O.] by the IIU, transcripts of the IIU interviews, transcripts of IIU interviews of five present and former employees at the Shelburne Youth Centre, written representations from [J.O.'s counsel] and [the file assessor], voluminous material received from the Department of Justice and finally, evidence obtained at the hearings of 24 September, 1997, and 21 January, 1998, I conclude the Claimant's Demand for compensation falls under category 10 (Medium Physical Abuse) and accordingly, I award the sum of $17,000.00. On a balance of probabilities, I dismiss the claimant's Demand for medium sexual abuse under category 6.

The file reviewer wrote that the degree of inconsistencies in J.O.'s statements and evidence at the first hearing was so severe as to place his veracity in question. In addition, the file reviewer referred to the interviews of former and current employees of Shelburne about the SAU, which caused him to conclude that employee A did not have an opportunity to commit the acts alleged. There was no discussion in the file review decision about the evidence with respect to the allegations of physical abuse.

A claim by B.D., a former resident of Shelburne, is illustrative of the files where the claimant did not name his or her alleged abusers. B.D. gave a statement to the Murphys on October 22, 1996, alleging that he was sexually abused over 40 years ago by three male employees and by other residents. He could not provide complete names of the employees, only descriptions. He claimed that the abuse consisted of oral sex, masturbation and anal sex, and that it occurred at least 100 times during his stay at Shelburne, which he said was approximately one-and-a-half years. He also claimed to have been "whacked on the head" by employees, as well as punched, kicked and shoved.

A Demand was filed on February 7, 1997. While acknowledging that sexual abuse by other residents was not compensable under the MOU, the Demand requested compensation of $85,000 under category 2 (severe sexual and medium physical).

On March 2, 1997, B.D. was interviewed by the IIU. He reiterated what he had said in the Murphy statement. In the Response of June 11, 1997, the file assessor wrote:

> In considering [B.D.'s] claim I have reviewed the information received from the IIU, the MOU, the Demand, the Survivors' Volume of Statements and institutional employee information available to me.
>
> In addition to the context provided by the Stratton Report and our experience with events at the relevant institutions, there are a number of general points which are taken into account in our assessment of Demands. These include the duration of the Claimant's stay at a particular institution, the actual time period of the stay, and the fact that all statements are necessarily subjective and therefore susceptible to the effects of time and subsequent experience on memory.
>
> According to the records, [B.D.] was at the Nova Scotia School for Boys in Shelburne between October 30, 1953 and June 28, 1954, a period of 7 months. You have submitted that [B.D.] should be placed in Category 2 under the MOU (severe sexual, medium physical) and awarded $85,000.
>
> From the description of the sexual abuse alleged, I agree with your categorization of severe sexual abuse.

The assessor, however, did not agree with the categorization of the physical abuse. An offer of $70,000, plus a counselling allotment of $10,000, was made, based on severe sexual and minor physical abuse. The offer was accepted. Since B.D. could not remember any of the names of his alleged abusers, there was no employee input in the case.

12. ANALYSIS

In Chapter X, I described the Government's announced changes in December 1996 to the Compensation Program. In this chapter, I described the impact of those changes on the Program, culminating in the development of yet more changes, contained in the November 6, 1997 Guidelines.

Prior to the reinstatement of the Program, there was some recognition on the part of Government that there was a need to 'tighten up' the validation procedures for claims. It was also recognized that this would require added resources to enable the IIU and the assessors to respond to pre-existing claims, as well as new claims which would follow the Program's resumption.

Consistent with this view, Mr. Barss proposed an expanded role for the IIU in the investigation of compensation claims.

The Program was reinstated only one month after it had been suspended. The additional resources needed to fulfill Barss' proposal were not in place. Further, there had been insufficient time for the IIU and the assessors even to 'catch up' on pre-existing claims. They had to cope with file reviews already scheduled to proceed, other pre-existing claims that had to be responded to, and the new claims which came forward. All of these were impediments to an effective investigative process. However, they were not the only ones.

The RCMP and IIU computer systems had not been integrated. No statement taking protocols for the RCMP and IIU had yet been created – this would not take place until April 1997. As I reflected in the previous chapter, the resumption of the Program did not await completion of either the RCMP or an IIU criminal investigation. As a result, the validation of claims could generally not rely on the products of those investigations. Further, because the Program's resumption did not await receipt by the Government of the particulars of all the claims being advanced, there was a limited ability to compare claims and the evidence bearing upon them. This could work for or against individual claimants, depending on the situation. Finally, the assessment and file review processes remained fundamentally the same. To the extent to which the Program now contemplated greater investigation of claims, and resort to written, recorded or documentary proof from all relevant sources, no effort had been made to clarify how that affected the way in which assessors and file reviewers were now to approach the validation process. All of this meant that the validation process remained seriously flawed.

As outlined below, all of these problems plagued the investigation, assessment and review of claims from the Program's reinstatement to November 1997, when the new Guidelines were released.

When the Program was reinstated, the IIU gave some consideration to files which had outstanding offers. Chambers quickly acknowledged that the IIU had neither the time nor the resources to investigate the vast majority of these files. He identified eight that should be held up, pending further investigation. However, some of these had already been settled or were close to settlement.

There were 181 to 192 additional files that had to be investigated and responded to by April 18, 1997 (the exact number could not be ascertained). By mid-March, it became clear that it would be nearly impossible for the IIU to complete its investigation in those files on time. The IIU simply *did not have the requisite resources. The IIU proposed that certain 'low level cases' be responded to based only on existing information. It stopped its investigation of some of these files. The Province was only able to provide its Responses to 74 of the Demands by April 18th. The balance could not be responded to in time.*

A random examination of the files processed by the Program from its reinstatement until November 1997 demonstrates that there was a wide disparity in information available to file assessors. For example, in a number of files examined, there was no employee input at all. In none were all of the named alleged abusers interviewed. In several, there was little or no IIU input. Even where the IIU had conducted an investigation, the information provided was not necessarily helpful in permitting assessors to evaluate the merits of the claims. As well, inconsistent reporting language was used to describe the IIU's findings or conclusions.

When the Program was reinstated, there were also 21 claims that were slated for file review beginning in February 1997. No interviews of past employees were commenced until January 1997. Even then, they were initially only telephone contacts that could not be used in file reviews. It was recognized that if the IIU found information to refute a claim, but could not obtain a written statement, the Program office would be unable to rely on the notes of telephone interviews in the file reviews. In my view, a validation process that is unable to present countervailing evidence to a claim merely because of investigative time constraints has little credibility.

In summary, time constraints and limited resources meant that, right from the outset, assessors and investigators struggled to meet the 120-day deadline and had to determine which investigations should be abandoned in the interests of time and resources. The Program was inundated with files that had to be responded to by mid-April 1997. Claim files already the subject of offers before the suspension were settled without further consideration or investigation. Some files continued to be assessed and sometimes reviewed without any interviews of available employees having been conducted. In other cases, telephone interviews only had been obtained, preventing their use during file reviews.

Even when employee statements later became available, the way in which they were used within the validation process was itself unsatisfactory. File assessors and reviewers struggled with how employee denials in writing could be used to resolve issues of credibility within the framework of the existing validation process.

The random examination of some of the file reviews conducted during this period demonstrates the existence of these problems. The disparity in information available to assessors *was manifested by a similar disparity in the kinds of information available during the file review process. As more investigative work was done on files, some file reviewers wrestled with the interplay between the MOU, the burden of proof and the assessment of credibility. Some were of the view that they had little scope to assess the claimants' credibility within the existing Program, absent patent or demonstrable fraud. Put another way, claims were to be accepted absent countervailing evidence that demonstrated that they were untrue.*

This approach, which was understandable given the philosophy underlying the original MOU, was deeply flawed for a number of reasons. First, the countervailing evidence – namely that of the alleged abusers – was often unavailable to assessors or reviewers, even in the form of written statements. Assessors and reviewers were taking positions as to whether abuse did or did not occur without access to some of the most important evidence bearing on the claimant's veracity. Second, even where the written denials of employees were available, the file reviewers were placed in the position of weighing the testimony of claimants against written statements to the contrary. How could any validation process be regarded as fair and credible, given those parameters? Third, the claimants' credibility was being measured by some reviewers against the findings of fact made by Mr. Stratton. That is, the credibility of certain allegations made by claimants was enhanced because they conformed to findings that Mr. Stratton had made about what was transpiring generally. As I have earlier noted, Mr. Stratton did not contemplate that his qualified findings would substitute for validation of individual claims or be used for this purpose. Similarly, at least one file reviewer relied on the survivors' book of statements not merely to determine the appropriate category of monetary compensation, but as circumstantial proof of the truth of the claim under consideration.

Polygraph testing was introduced into the process. Considerable time was devoted by the Government to explore whether polygraph testing should be employed and, if so, how it should be done, by whom, and what weight should be placed on its results. Ultimately, the reliance on polygraph testing was incorporated into the November 1997 Guidelines. Although claimants were not compelled at any time to submit to such testing – nor should they have been – it is obvious to me that the IIU placed heavy reliance on the results of such testing. The fact that an employee had passed a polygraph test was even regarded as a basis for placing the claim against that employee on a list of fraudulent claims.

The debate over the reliability of polygraph testing has raged for some time. It is not unique to Nova Scotia. The Government consulted Dr. Raskin, a well known proponent of polygraph testing, as an expert to assist it in evaluating what use should be made of such testing. There are others who take diametrically opposed positions as to the reliability of such testing. The Supreme Court of Canada has ruled such evidence to be inadmissible in criminal proceedings.

In the Report of the Commission on Proceedings Involving Guy Paul Morin, *I examined the use of the polygraph in the investigation that led to the wrongful conviction of Guy Paul Morin. Polygraph tests were administered to two jailhouse informants who claimed that Morin confessed to the crime which he ultimately was shown not to have committed. The polygraph was also used by investigators as a "quick and ready means of clearing suspects." I found that the investigators there placed undue reliance, at times, upon the polygraph. I said:*

> *Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for a full and complete investigation. Officers should be cautious about making decisions about the direction of a case exclusively based upon polygraph results.*

In my view, investigators were entitled to weigh the fact that a number of employees voluntarily took and passed a polygraph test in determining whether allegations against those employees were true. However, as I said before, polygraph results cannot substitute for a full and complete investigation. The IIU was not provided the time or the resources to conduct a full and complete investigation of the claims made to the Compensation Program, even assuming that it was appropriate to allow the IIU, rather than the police, to conduct the investigation in the first place. It appears to me that the IIU came to regard the polygraph as virtually determinative for several reasons:

- *First, the results tended to confirm the IIU investigators' own views as to the veracity of many of the sexual abuse claims;*
- *Second, the investigators were sometimes unable to conduct full investigations. As a result, polygraph testing acted, to some extent, as a substitute;*
- *Third, the IIU recognized that employees could not be heard from directly during the file review process. The testing provided an opportunity for their voices to gain greater prominence in the validation process;*
- *Fourth, with respect, the IIU regarded the polygraph as more infallible than its history might warrant.*

In Chapter XII, the use of polygraphs (as later countenanced by the Guidelines) is more fully described. Here, I simply note the difficulty, if not the impossibility, of asking file reviewers to weigh polygraph results obtained from individuals who were not entitled to be heard in person at the file review itself.

It is obvious that, as the Program continued, and the IIU heard from more and more employees, its investigators became increasingly sceptical about abuse claims generally. Stories about the exchange of information within correctional facilities no doubt heightened this scepticism. There were also serious concerns over new or different allegations coming forward after the compensation grid was published. All of this meant that claimants who were being interviewed by the IIU were being more thoroughly scrutinized.

Counsel for the claimants raised concerns over the way in which their clients were being interviewed by the IIU. These concerns persisted even after the RCMP and IIU signed a statement-taking protocol in April 1997. The protocol was supposed to minimize both the need for claimants to be interviewed more than once, and any adverse effect the IIU investigation might have on the concurrent criminal investigation. It became obvious to me during my review that, unfortunately, the relationship between the RCMP and the IIU, at times, did not advance these objectives. The protocol was often not followed in practice. Indeed, the RCMP felt that the IIU was undermining the conduct of the criminal investigation. At one point, the IIU complained that one of the reasons why the 120-day deadline could not be met was that they had to redo the RCMP 'pure version' statements. Interestingly, these statements were the subject of agreement in the protocol between the RCMP and IIU.

The concerns raised by claimants included the following:

- *The IIU investigators were not respectful of the claimants. They would sometimes arrive unannounced at the claimants' homes to conduct interviews;*

- *The IIU did not always permit support persons to attend interviews;*

- *Claimants were being interrogated, particularly about the contents of records, and called upon to explain the denial of abuse by the alleged abusers;*

- *Institutional records were not released to claimants before they were questioned by the IIU about the records' contents;*

- *In July 1997, the IIU imposed a requirement that claimants sign blanket authorizations to permit the IIU to obtain their medical records before they were interviewed. This procedure did not limit the requests for medical information to situations where the information might be relevant to a claim. Further, the IIU did not consult with the Program office about the need for medical records on a case-by-*

case basis before demanding them. Indeed, IIU investigators were often unaware of the substance of the claim before the demand for an authorization was made;

- *The IIU did, at times, request re-interviews of claimants where they had not even looked at the RCMP video statements.*

The IIU, on the other hand, felt that they were respectful of and fair to the claimants. They regarded it as their role to test the veracity of the claimant's account. This meant that pure version statements could properly be followed by somewhat direct or pointed questions. Mr. Chambers noted in his correspondence with Ms. Derrick that the compensation process provided few mechanisms to allow the Province to challenge claimants' allegations. Accordingly, where it was suspected that an allegation was fabricated, it was necessary to probe the alleged events in the interview with relevant questions. As for the suggestion that records were withheld from claimants, the IIU felt that disclosure would undermine their ability to obtain information, untainted by outside influences.

In my staff's interviews with the IIU, the RCMP and the Murphys, it became clear that the various parties had different views not only on how statements should be taken, but often on how well other parties were taking statements. These differences in perception – honestly held – reflect the difficulties inherent in conducting, sometimes concurrently, more than one investigation into the same allegations. They also reinforce the importance of established protocols, at the outset of any investigation, that promote cooperation, and avoid duplication of efforts and wasting of resources. My recommendations later address these issues.

Those who were interviewed, whether claimants or employees, also had different perceptions on how the various agencies took statements. For example, a number of claimants found the Murphys to be sensitive to their victimization, in contrast to the IIU, who were regarded, at times, as accusatory. Some claimants were reinforced in this view by the fact that the IIU investigators often knew them from prior encounters with the law. Many employees, on the other hand, regarded the IIU interviews initially as accusatory, but then as fair, even sympathetic, as the IIU became more knowledgeable about the claims. No one regarded the Murphys as accusatory, although the employees expressed concern about how the Stratton investigation was generally conducted.

In my view, investigators must approach any interview in an open-minded way, free from stereotypical notions about abuse, claimants or employees. Although my recommendations later address this point more fully, I am of the view that the IIU may sometimes have allowed their preconceived notions about individual claimants or claims to unduly affect the way in which their *interviews were conducted. Their perceptions may well have been correct about the merits of individual cases but, nonetheless, I must emphasize that interviews of claimants and employees should have been conducted in a completely open-minded way, without any preconceptions. This was not always done. In fairness, this reflected, in part, the IIU's understanding – which was correct – that the assessment and review process provided little or no opportunity to challenge the veracity of claimants. As such, the IIU may have felt that it was important to be pointed in their questioning of claimants.*

Claimants were entitled, subject to limited exceptions, to have support persons present for interviews. At the investigative stage, they were also entitled not to be cross-examined. There are investigative techniques that permit investigators to explore perceived problems without resorting to cross-examination.

A process that permitted the wholesale review of claimants' medical and other private records without regard to relevance violated the dignity and legitimate privacy interests of claimants and, of significance, is not even a requirement for parties to adversarial litigation. Finally, if the RCMP had conducted a video interview of a claimant, fairness required that, in the least, the IIU review that video before compelling that claimant to be re-interviewed. Even if additional questions were required, review of such a video should obviate the need to have the claimant re-describe each and every allegation, unless the object of the exercise is only to trap the claimant in inconsistencies. The latter approach is incompatible with a process that is intended to meet the needs and interests of true victims of abuse.

As is obvious from my comments throughout this Report, I am of the view that the Compensation Program was unfair to employees by failing to provide for a credible validation process that appropriately recognized the importance of hearing from them. But having said that, I also recognize that this process might have become unfair to true victims of abuse as well. As the IIU became increasingly sceptical about the majority of abuse claims, and recognized that there was not a forum for the employees' accounts to be fully considered within the Program, their interplay with claimants became more accusatorial, until the process became quite unfriendly not only for those whose claims were false, but also for true victims of abuse. The effect on true victims was, no doubt, compounded by the fact that the Program was originally designed very differently. As I have said elsewhere, claimants could justifiably regard the changes in the Program as a betrayal of the spirit and express terms of the original MOU, negotiated in good faith with the Government.

I also note in this regard that the IIU began to assemble a list of persons who they felt had made fraudulent claims. Whether or not their assessment was correct, the reasons why a file would *be placed on the list do not always instill confidence. Inclusion on the list based on the fact that the employee had passed a polygraph test may again show undue reliance on the polygraph results. Inclusion on the list based on the fact that the claimant made a high Demand, was offered less, and then settled, may show a fundamental misunderstanding of the motivation to settle, and the high emotional costs of revisiting abuse, for true victims.*

General dissatisfaction with the process – on the part of claimants and employees – prompted calls for a public inquiry. It was suggested in the briefing note Barss provided to the Premier's office that it was likely that a public inquiry would only confirm Mr. Stratton's findings or, alternatively, that the IIU could provide a comprehensive report that would quell the calls for such an inquiry. In my respectful view, whatever the merits of a public inquiry, which I later address in my recommendations, it could not reasonably be discarded because it was likely to confirm Mr. Stratton's findings – itself, a highly debatable proposition – or because the IIU could produce a substitute report. The very strength of a public inquiry rests on the fact that its findings are based on sworn evidence, with rights afforded to affected parties to cross-examine, tender evidence and make submissions, and upon the independence and impartiality of the presiding Commissioner, often a judge or former judge.

The Guidelines were introduced in November 1997. A number of its provisions did represent an improvement over what previously existed. It was fitting to articulate the burden of proof both for the Province and for file reviewers, and to make it the balance of probabilities. It was appropriate to reflect that where one groundless, implausible or deceitful allegation was made, the Province would draw an adverse inference in considering other allegations. Without purporting to speak to the precise amount of time that the Province should have been given to respond to claims, it was reasonable to further extend the time within which to respond and to reflect that complex cases or delays in obtaining material might justify even a longer response time. It was also entirely appropriate to amend the confidentiality provisions of the MOU so as not to permit disclosure to other survivors. Finally, the substitution of the term "claimant" for "survivor" was understandable, although, like many other issues, it should have been foreseen at the outset.

Some of the Guidelines' provisions were less desirable. Although the Guidelines provide some protection against indiscriminate access to medical and other private records, a provision that permits access to such records "where they are needed to evaluate the Demand" provides insufficient protection to affected individuals.

I accept that there was a place for polygraph testing within the investigative process. I do not agree with the use of polygraph results, subject to exceptional circumstances, during the file *review process itself, particularly given the fact that the subjects of the polygraph testing were not themselves witnesses. It was appropriate that claimants not be forced to take such tests.*

The most significant change in the Guidelines limited file reviews to written submissions only. In my view, such an approach precluded the reviewers from properly assessing credibility, failed to recognize the desirability of permitting true victims of abuse to be heard, and ultimately undermined the credibility of the validation process itself. In stating that written reviews precluded the reviewers from properly assessing credibility, I refer not only to the opportunity to observe the witnesses (the importance of which can be overestimated), but the ability of the reviewer to question the claimant or clarify what it is that the claimant has to say.

I comment further on the Guidelines once I have described, in Chapter XII, how the Program operated after they came into effect.

XII

Completion of the Program

1. INTRODUCTION

The changes brought about by the Guidelines were described in the previous chapter. Perhaps the most important dealt with the validation process. First, the Guidelines required that both the Province and the file reviewer, as a condition for making an offer or award, be satisfied on a balance of probabilities that the claimant experienced the sexual and/or physical abuse described in his or her statement. Second, in deciding the validity of the allegations, the Guidelines stipulate that both the Province and the file reviewer shall consider in evidence:

- The claimant's statement or statements;
- The claimant's institutional records;
- Employment records of employees or former employees against whom the claimant has made an allegation or allegations;
- Polygraph test results (where available);
- The claimant's medical records;
- Any other relevant information.

The Guidelines tried to fix the problems that, in the Government's view, had beleaguered the Compensation Program. This chapter will focus on the operation of the Program after the promulgation of the Guidelines.

2. STATUS OF THE PROGRAM AFTER THE GUIDELINES

As of November 6, 1997 (the date on which the Guidelines came into force), the Compensation Program office had eight full-time file assessors, one part-time file assessor, 11 support staff and the Program Director. The IIU Claims Validation Unit had 10 investigators and seven support staff. In addition, the IIU had five investigators whose task it was to examine allegations against current employees and to review completed claim files to determine if there were sufficient indications of fraud to justify referral to the RCMP or to the civil litigation section of the Department of Justice.

No statistical report prepared by the Program office is available regarding the status of the Program as of November 6, 1997. However, a report dated December 5, 1997, indicates that at that point there were 1,451 notices of claim. Nine hundred and fifty-seven claimants had actually submitted a Demand, leaving 494 that could be added to the Program office's case load (1,451 less 957). Responses had been made to 700 Demands. Assessors had accepted 26 as submitted, and outright denied 61.[134] The total number of claims completed was 613.

My staff obtained a final statistical report on the Program. The total number of Demands handled was 1,246. The Province accepted 35 Demands as presented, and totally denied 166. Eight hundred and fifty-four were settled by negotiations. Four hundred and forty-five entered into the file review process. Eighty-eight of those were settled by negotiation prior to completion of the process, and 356 were completed by decisions from file reviewers. One case is still pending.

By comparing the statistics from the end of the Program to those available at the approximate time of the introduction of the Guidelines, it can be seen that approximately one-half (613) of the total claims processed by the Program were concluded prior to the introduction of the Guidelines. However, of the 356 claims completed by a file review decision (and not negotiation), 260 were handled pursuant to the Guidelines.[135]

Of the 90 randomly selected files that were reviewed by my staff, 41 were completed in this third, or last, phase of the Program. Before discussing the results of the audit of these files, it is useful to discuss two of the major changes to the validation process, namely, the use of polygraph test results and the abolition of "in-person" file reviews, as both of these changes had a significant impact on the file review process.

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[134] Of the 61, three had been settled after the initial denial, 17 had been completed by file review decision, and 41 were still in the file review process.

[135] Thirty-three of the total file reviews were heard and concluded prior to the reinstatement of the Program on December 6, 1996 (phase one), and 63 between December 1996, and November 1997 (phase two).

3. POLYGRAPH EVIDENCE

The IIU documented that by October 31, 1997, 35 current and former employees had voluntarily submitted to polygraph tests. Thirty-three passed and two failed. Ultimately, a total of 65 current or former employees underwent polygraph testing in response to allegations of sexual abuse, two of whom also took the examination in relation to allegations of physical abuse. Of the 65, 59 were considered truthful, three were considered deceitful, and in three cases the tests were inconclusive.

Section 6.5 of the Guidelines provides that where a polygraph examination is conducted on an employee with respect to the truthfulness of some or all of the allegations made by a claimant, the claimant must be notified of the existence of the test and given an opportunity to also undergo a polygraph examination. Sixteen complainants expressed an interest in doing so, but in the end only two did. Both were found to be deceitful.

A Polygraph Argument and Book of Authorities was prepared by a file assessor and used as a template for assessors' submissions to file reviewers in cases where polygraph evidence was available. This document set out the leading authorities in Canada regarding the admissibility of this type of evidence and the weight that may or may not be accorded to the results of such testing.

The Polygraph Argument acknowledged that the Supreme Court of Canada had determined in *R. v. Beland and Phillips*[136] that the results of a polygraph examination are not admissible in a criminal proceeding. Nevertheless, the document referred to case law which supported the admissibility of the results of such examinations in family and civil litigation and in labour arbitrations. It argued as follows:

> The *Beland* case did not disallow the use of polygraph evidence on the issue of technical reliability, but with respect to the rules of evidence, especially the rule against oath helping and the proper use of expert evidence.
>
> That, it is submitted, is a reasonable restriction in **the setting of a full trial.** In that instance, the trier of fact has at her disposal the testimony of all relevant witnesses. Determination of credibility is one of the elements s/he must determine. It is reasonable not to substitute the

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[136] [1987] 2 S.C.R. 398; 36 C.C.C. (3d) 481.

> expert opinion of the polygrapher for that which the trier of fact can form from the testimony before her.
>
> However, the *Beland* facts are not what is found in the file review in this process. The only witness who was available to testify is the claimant. The employee against whom the claimant alleges is not present or available for examination. There is, therefore, a place for the polygrapher's opinion in this process.
>
> (Emphasis in the original.)

Counsel for the claimants objected to the inclusion of polygraphs in the Guidelines. For example, in a letter to Michael Dempster (the Program Director) dated November 7, 1997, Anne Derrick disputed that the polygraph would be a useful tool in the process. She and John McKiggan, who represented approximately 46% of all claimants, advised me that, as a matter of policy, they counselled all their clients not to submit to a polygraph examinations. Assurances had been given by the Minister of Justice in a television interview on November 7,1997, that no adverse inference would be drawn against an employee or a claimant should he or she decline the opportunity to undergo such an examination.[137]

In one of Ms. Derrick's submissions to a file reviewer, she expanded on the reasons underlying her standard advice to all clients:

> 1. The questionable validity of polygraph results;
>
> 2. The risk of a polygraph examination producing a "false positive" (an indication of deception in a subject who is telling the truth);
>
> 3. The fact, based on a general telephone conversation with Sgt. Mark Hartlen, that any polygraph administered to claimants will not examine the question of whether they were sexually abused but instead will deal with whether they have made a false claim;
>
> 4. My fundamental objection in principle to any of my clients being treated as suspects in a process they were originally promised would be "*principled, respectful and timely*", would "*affirm the essential worth and dignity of all the Survivors, who were residents of the Institutions*" and would "*assist the Survivors, in a tangible way, with the healing process*" etc. (Preamble to the Memorandum of Understanding).
>
> (Emphasis in the original.)

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[137] This position was confirmed by Mr. Dempster and adhered to by the file assessors throughout the operation of the Program.

Counsel for the various claimants produced a great deal of material that attacked the reliability of polygraph examinations. Based on these materials, it was their position that a file reviewer ought not to give any weight to polygraph test results.

Our review of a number of file review decisions establishes that there was a wide range of responses by file reviewers to polygraph evidence. Some gave no weight to it at all, while others placed reliance on the test results where the allegation of the claimant had been specifically put to the alleged abuser.

One file reviewer said this about polygraph evidence:

> The foregoing now leads me to a brief discussion of polygraph evidence. As per Section 9.4(b) and 9.5 of the Guidelines, I am duty bound to admit into the evidence the opinion of the polygrapher, Sgt. Mark Hartlen of the Halifax Regional Police Service, as it relates to the evidence of [employee]. The polygrapher found no deceit indicated. It is important to emphasize at the outset that I am not in favour of this method of adducing evidence. I say this mainly because of the great dangers that can arise through its use and I base my opinion on the materials the Province provided, entitled Polygraph Argument and Book of Authorities.
>
> .....
>
> Dr. Raskin sums up in the last paragraph of his letter by stating:
>
>> Finally, I would like to add a comment and a procedural suggestion. The fact that nineteen of twenty accused have passed their polygraph examinations by producing non-deceptive results raises a very strong suspicion that many of the cases involve false allegations. (He no doubt is referring to the counsellors at the Shelburne Youth Centre and other youth facilities in Nova Scotia). If as many as ten percent of non-deceptive results are false negative errors, the probability that nineteen of twenty such results are erroneous is vanishingly small. It is essentially zero. I suggest as a procedural requirement that in cases where the accused has obtained a non-deceptive result on a properly administered and interpreted polygraph examination, the accuser should be expected to undergo a similar examination by a qualified examiner. If the accused has passed and the accuser fails, this should be strong enough evidence to close the matter.
>
> I strongly disagree with the above noted quote from Dr. Raskin's letter. Firstly making such a blatant statement as he has could possibly tarnish the minds of individuals at the Department of Justice who are administering this Program in that they could prematurely form an opinion that if a counsellor tested non-deceptive, the Claimant could not be truthful in his or her allegations.

> Secondly, the Claimant should be under no forced obligation to submit to a polygraph examination if he/she do not wish to submit to such an examination. Moreover, no inference on the part of assessors at the Department of Justice should be made concerning the Claimant's refusal to submit to such an examination.
>
> .....
>
> From a reading of the above and indeed the complete polygraph materials provided by the Province, it is abundantly clear that the use of polygraph evidence is far from an exact science and is fraught with many dangers. As a result, I treated the results of Mr. [employee's] polygraph examination as "another piece of evidence" and afforded it no more weight than it deserved.

A recent file review decision, released on October 9, 2001, reached a similar conclusion. The claimant had made allegations against six former and current employees. Two of those employees were deceased. However, the remaining four had undergone polygraph examinations, some addressing allegations in a general way, others more specifically. The file reviewer cited the opposing arguments by the file assessors and counsel for the claimant regarding the weight to be given to polygraph results. Although the file reviewer treated the results as "another piece of evidence," he assigned no weight to any of the results of the four employees, and concluded, on a balance of probabilities, that the claim was made out under Category 2 (severe sexual and medium physical abuse). He awarded compensation of $90,000, plus a counselling allotment of $5,000.

Another file reviewer felt differently about polygraph evidence:

> Obviously, the fact that a lie detector test has shown [employee A] to be truthful in denying the sexual allegations is very important evidence in how I assess the involvement of [employee A] and this young man. I should point out that much is being made in a number of the submissions about the burdens of proof and the thresholds to be met by the adjudicator and yet, I would only repeat as I have in earlier decisions that I don't believe the process is that difficult. The Program as it now stands had been redesigned, and the threshold is on the balance of probabilities; unfortunately we do not have a chance to meet or cross-examine the complainant or alleged perpetrators, and in many cases we do not hear from the alleged perpetrators. This leaves the adjudicator in the ... position of having to draw conclusions of some significant importance without ever meeting the parties involved.
>
> Polygraph evidence is very important. In fact, I have received very extensive representations on other file reviews as to the accuracy of the polygraph evidence, and have found it to be very powerful in assessing one person's credibility against another's. Furthermore, the use of this evidence is clearly set out as an accepted part of the process. It is abundantly clear that the vast majority of the abuse related by the Claimant is alleged to have occurred at the hands of a [employee B]. Unless I am in error, or there is some further confusion, I don't believe anyone has heard from [employee B] to deny any of these allegations. The ongoing repeated assaults clearly centre on [employee B] and not on [employee A], with the allegations as to [employee A] being a few isolated physical assaults and one incident of masturbation.

> The Program calls for conclusions based upon the balance of probabilities and, regarding [employee B] I have the Claimant's statement and nothing to counter it from [employee B] or from any other witnesses. I refuse to conclude that because there is a discrepancy between what the Claimant is saying and what [employee A] is saying, which is supported by the lie detector results in the Crown's favour, that this must be conclusive as to all of the allegations. If in fact [employee B] has passed the lie detector test, I would expect my decision to be quite different in this matter, but apparently that evidence is not here. I haven't heard from [employee B] or in fact had an opportunity to even interview him or the Claimant.

It was not uncommon for a claimant to make claims of abuse against a number of different employees, some of whom may have been polygraphed on sexual allegations, but not on physical ones. Furthermore, not all of the employees were available to be polygraphed or even interviewed.

In one claim that went to file review, the claimant, P.F., alleged minor sexual abuse against an unnamed carpenter. He also claimed to have been subject to chronic beatings causing serious personal trauma at the hands of a particular employee. That employee underwent and passed a polygraph examination in relation to allegations by other claimants alleging sexual abuse. However, because of the opinion as to the inadequacies of polygraph examination for allegations of physical abuse, the employee was not given a polygraph examination on P.F.'s allegation. Further, it does not appear that the employee was interviewed in relation to the allegation. The file reviewer commented:

> [P.F.] claims that he was subjected to chronic beatings and suffered serious personal trauma. He describes one particularly serious beating at the hands of Mr. [employee], an individual who by now was well-known to file reviewers as being notorious for inflicting beatings, particularly on smaller boys at this institution.
>
> The Department of Justice, in its Response, does not take issue with the facts as alleged by [P.F.]. I shall take a moment to review the Department of Justice's position. The Department of Justice basically states that the issue here is characterization of the offence complained of and the determination and the severity of those events, and with that, I do agree.
>
> .....
>
> The Department of Justice agrees with the suggestion that the assaults were medium physical abuse. Mr. Ford suggests the fact that [P.F.] received no hospital treatment makes it unrealistic to conclude that he broke his nose and his ribs. He also suggests that it is inconceivable that [P.F.] would have continued in his day-to-day activities at the school with broken ribs. I disagree with both of these comments because of what we now know about this institution and what we now know about the abuse children did suffer there. I am certain that many people attended classes and went about their day-to-day activities with broken bones and broken ribs and to complain in most cases was futile in any event.

The file reviewer awarded $20,000 compensation.

4. IN-PERSON FILE REVIEWS

The second major change to the file review process brought about by the Guidelines was the abolition of the right of the claimant to appear personally. Counsel for the claimants strongly objected to this change. For example, in a letter to Michael Dempster dated November 7, 1997, Anne Derrick said the following:

> I am compelled to say that I am at a loss to understand the policy rationale for removing the entitlement of survivors to participate directly in File Reviews. This was an aspect of the process that not only enabled survivors to have an actual hearing if they wanted it, with counsel, it also provided File Reviewers with a direct opportunity to assess credibility. I regard the disentitlement of survivors to an oral hearing as a cynical departure from the original principles along which the compensation process was established.

My staff could not find policy documents that set out the factors considered by the Government in abolishing in-person file reviews.[138] However, comments on the abolition were made by file assessors in the course of making submissions to file reviewers. In one such submission, dated April 19, 1999, the file assessor explained as follows:

> In light of the fact that the accused counsellors were not able to attend these hearings while the accusers were able to attend, this revision is seen as ensuring that a greater degree of due process is being exercised within the Compensation Program.

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[138] The assessors discussed the option of adopting an adjudicative model for file reviews. This option would have the hearing conducted before a panel of three persons (presumably with witnesses). The assessors identified a number of issues that would need to be addressed if employees were to be permitted to have a role in the file review process. These issues were articulated as follows:

- Where there is an offer and appeal can the employee be heard and deny the allegation?
- If so, where does that put the offer?
- Would the lawyer/assessor have the opportunity of interviewing the employee in advance of the appeal?
- Who represents the employee, the Province or his or her own counsel?
- If employee participation is allowed, it will be necessary to ensure that no adverse inference will be drawn against those who choose not to participate.

Furthermore, a file assessor wrote to Dempster on October 14, 1998, remarking on the criticisms that file reviewers were offering on the changes made by the Government to the Program:

> The criticism I find particularly offensive relates to the elimination of the claimant's personal appearance before the file reviewers. The reasoning behind this particular change was logical, financially responsive, and from my understanding, based to some extent on a sense of fair play. One factor was that the financial and practical logistics in arranging file reviews was prohibitive, the money could be better spent on counselling and compensating victims. What I consider to be a stronger and more appropriate consideration is the unfairness and ethical considerations in allowing the claimants to appear before file reviewers without giving the same opportunity to the accused employees, which would be possible in a criminal or civil action. The only reason that the claimant lawyers have put forward to support the personal appearances of their clients is the file reviewer's right to judge the claimant's credibility on their own. This is not really correct. Credibility of a claimant from a personal appearance can be made from a viewing of the video taped interviews. What is really missing is the opportunity for the claimant to make a personal **emotional** appeal to the file reviewer. The courts have consistently stated that emotions are not be considered in decision making! There is no reason why a file reviewer should be any different![139]
>
> (Emphasis in the original.)

A number of file reviewers reflected on the difficulty created by requiring them to make assessments of credibility without hearing in person from the claimant or from the alleged abusers. One file reviewer stated:

> I am at a very substantial disadvantage in coming to conclusions in such matters because I have only the opportunity to read the transcripts and not to see these witnesses in person. In such circumstances, the substantial risk that comes with not being able to observe demeanour is always present, a lack of which can feed into a conclusion that may be inappropriate, but I can only work with the materials I have been given.

A questionnaire was circulated to all file reviewers by my staff. Twelve of the 19 active file reviewers responded. Only one felt that the changes instituted by the Guidelines did not materially affect the file review process. The remaining 11 all thought the changes made the evaluation of credibility more difficult and detracted from the process. As one commented:

> [r]emoval of the interview was a retrograde step. It was helpful when credibility was an issue, as it frequently was. I have endured the tedium of watching 3-4 hours of videotaped interviews in which the only relevant parts might last 5 or 10 minutes and the right questions may never have been asked.

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[139] Mr. Dempster responded by e-mail that they had done an in-depth review prior to changing the process that included these issues.

5. AUDIT OF RANDOMLY SELECTED CLAIM FILES

As noted earlier, of the 90 files reviewed by my staff, 41 were completed in this third and last phase of the Compensation Program. The purpose of our review was to determine the way in which claims were processed, some of the difficulties which were encountered, the reasons for those difficulties and, in general, to achieve a better understanding of how the Program actually operated.

As provided by the Guidelines, claimants were required to submit a Demand – a two-part document comprised of a letter setting out the amount requested and the category under which the claim should be considered, with reasons therefor, as well as a statement taken by Facts-Probe Inc. (the Murphys), a police agency, or the IIU.

In the first two phases, most statements were taken by the Murphys. In this phase of the Program, however, most statements were taken by the IIU or the RCMP.

The majority of the 41 files examined contained multiple statements (sometimes taken by the same agency). The total number of statements contained in these files was 82. Only 13 of the files relied on a single statement from the claimant. In10of these, it was a statement given to the IIU, two had statements made to the RCMP, and only one claim was based on a Murphy statement.

In the 41 files, allegations were made against 73 former and current employees, as well as seven unnamed or unknown employees. In only 15 files were the alleged abusers either interviewed or polygraphed. In six of the 41 files, other witnesses – former residents or former or current employees – were interviewed (sometimes by phone). In 26 files there was no employee input. Eight of the named employees were deceased at the time that the claims were processed.[140]

Polygraph results were used in eight of the 41 files. All employees passed the test. In one file the claimant had also been polygraphed, but failed the test.

Five of the 41 claimants asked for compensation in the range of $5,000 or less, 11 sought from $15,000 to $30,000, 17 asked for $40,000 up to $70,000, and eight demanded $90,000 to $120,000. The Responses made by the Compensation Program office were as follows: four claims were denied, in 27 cases an offer was made of $5,000 or less, in two cases the offer was between $6,000 and $15,000, in six it was from $16,000 to $25,000, and in two the offers were for $45,000.

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[140] In two out of the 26 files where there was no employee input, allegations were made against three named employees. In both files, two out of the three named employees were known to be deceased.

Thirty-seven of the 41 files contained reports prepared by the IIU. In the remaining four files, the assessors were provided with institutional records only. In offering their conclusions to the assessors, the IIU used the following language:

- Alleged incident cannot be substantiated, due to the fact that the complainant is unable to provide names of witnesses or times to corroborate his story;
- It cannot be determined if the version of events given in the complainant's allegations are [sic] truthful;
- There is no evidence to support or refute the victim's statements;
- There are no records to support or deny the broken wrists;
- Because of the contradictory information plus [an employee's] polygraph results, the allegations should be considered suspect;
- The injury was not a result of intentional physical abuse by [a counsellor];
- In the opinion of this writer the allegation lacks credibility in both substance and presentation;
- If the allegations are to be believed, the use of force and punishment exerted by [a counsellor] was excessive and not supported by institutional policy;
- We must give some weight to what would have been considered reasonable punishment in 1962. The type and style of discipline has changed over a thirty-six year period. There is no documentation to support or deny this allegation;
- When the balance of probabilities are [sic] weighed it can be concluded that the incident with [a counsellor] may have occurred and probably was discipline. There are no witnesses to this allegation.

Of the 41 files, 14 were completed by file review. The awards given ranged from $3,000 to $41,000. In two cases, the file assessor's complete denial was upheld at file review. The following samples of file review decisions show some of the problems that remained in the compensation process. As it turns out, a number of them dealt with polygraph evidence.

E.B. submitted a Demand alleging sexual and physical abuse by one employee and physical abuse by three others. It was a Category 6 claim (medium physical and medium sexual abuse), and the amount sought was $55,000. The claimant had undergone a polygraph examination, and failed. The employee against whom sexual abuse was alleged had also taken a polygraph test, and passed. The employee was supposed to have been working nights at the time of the alleged abuse, yet the file assessor pointed out that the employee did not work nights. The assessor also argued that there were significant inconsistencies in the multiple statements made by the claimant, making it difficult to determine which, if any, of the allegations might be true.

The file assessor questioned the claimant's credibility, but nonetheless found a "thin line of consistency" with respect to two of the allegations and made an offer of $2,000. The file reviewer concluded that the claimant's description of the incident of sexual abuse did not have the ring of truth to it. He stated:

> I am prepared to give some weight to the results of the polygraph examination which determined that there was no deceit indicated by [employee], but that there was deceit indicated by [E.B.]. I have taken great care not to place undue weight on those polygraph examination results, but rather to treat them as one of the several elements to examine in assessing whether [E.B.] has persuaded me on the balance of probabilities that the sexual abuse which he describes did take place. Having taken all of those factors into account, I have concluded that [E.B.] has not met that standard. I am not persuaded that it is more likely than not that the sexual abuse described by [E.B.] did indeed take place.

The reviewer accepted the Province's position that, at a minimum, some incidents of physical abuse did take place, and concluded that the claimant should be compensated in the amount of $2,500, plus the applicable counselling allotment.

J.G. claimed he was physically abused by a number of counsellors when he was a resident at the Nova Scotia Youth Training Centre. He also claimed that he was the victim of sexual abuse, including rape. A Demand was made for compensation in Category 6 (medium sexual and medium physical abuse) in the amount of $60,000. The accused employee had been given a polygraph examination with respect to the allegations of sexual abuse and had passed. J.G. declined the offer to undergo a polygraph examination.

The assessor, in his Response, pointed out the inconsistencies in J.G.'s statements and relied on the employee's polygraph test that dealt directly with the claimant's allegations of sexual abuse. However, he accepted that J.G. suffered medium physical abuse and offered a settlement of $10,000 plus a counselling allotment. There is no indication in the file as to why this concession was made.

The file reviewer noted that the Province had acknowledged that medium physical abuse had occurred, so the remaining issue was whether or not, on a balance of probabilities, the claimant was sexually abused as described in his statement. She concluded:

> I find that on a balance of probabilities [J.G.] was sexually abused by an employee of the institution while he was a resident of the institution. There were three incidents of sexual abuse:

> 1. anal penetration on one occasion;
>
> 2. attempt by the perpetrator to have anal sex with the claimant, which attempt was unsuccessful;
>
> 3. attempt by the perpetrator to have the Claimant perform oral sex on him, which attempt was unsuccessful. In the course of that attempt the perpetrator touched the side of the claimant's face with his erect penis.
>
> I cannot find, on a balance of probabilities, that the perpetrator was the person named by the Claimant: [employee]. It is possible that the claimant misnamed his abuser.

The reviewer concluded that an award should be made "pursuant to Category 10 [sic][141] (medium physical and medium sexual abuse) in the amount of $50,000," together with the counselling allotment.

D.M., a former resident of Shelburne, submitted a claim for $47,000 based on allegations of sexual abuse and physical abuse under Category 7 (minor sexual and medium physical abuse). The Response by the file assessor was that the physical abuse allegation should be categorized as minor and that the sexual abuse allegation was not specific enough to justify any offer. An offer for $2,500 plus a counselling allotment was made for the physical abuse. In the file review decision of March 2, 1998, the file reviewer commented as follows:

> Notwithstanding some significant changes which appear to be directed at resolving difficulties of assessing the credibility of claims (which difficulties I and others have referred to in earlier award decisions), the new Guidelines are not much better in that regard.
>
> The Province has set forth a basis for compensating people who make claims. It has done very little to address the question of assessing the credibility of those claims. One of the key factors in the old MOU was the right of the claimant to appear before the File Reviewer so there could be at least an assessment of the demeanour and way of giving evidence that might be helpful to the File Reviewer. That is now gone. We are relying entirely on written statements and records and videotape statements. There is a reference now to polygraph results but that is not a factor in this present claim.
>
> I can only come to the conclusion that, however unsatisfactory it may be for the Province, the File Reviewers are in the position where they must *prima facie* assume the allegations of the claimants to be accurate and accept them unless there is some very clear and compelling evidence or argument to the contrary.
>
> .....

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[141] Category 10 is medium physical or medium physical and sexual interference. It appears that the file reviewer meant Category 6, which is medium physical and medium sexual abuse.

> I point out again that the Province has, by its own formulation of the Guidelines, made it extremely difficult for it to contest the credibility or validity of the claims. I am constrained to follow the Program as set up by the Province and, based on that process, after reviewing all of the evidence that I have before me, I am satisfied on the balance of probabilities that he experienced the behaviour and abuse complained of.
>
> The objections made by the Province, in the absence of anything written or taped to challenge these allegations in a serious way, are at best speculative.

The file reviewer concluded that D.M. suffered abuse within Category 7 and awarded $41,000 in compensation plus the appropriate counselling allotment. There is no indication in the file if the alleged abuser was ever contacted. There was no IIU report, only institutional records.

H.M., a former resident of Shelburne, filed a Demand claiming physical abuse by two employees and sexual and physical abuse by a third. He provided two sworn statements, one to the RCMP, the other to IIU. He indicated that he was abused every day, that one employee had hit him 50,000 times, and that another employee had struck him on the side of the head causing loss of hearing. The alleged sexual abuse consisted of fondling by an employee who had since died. H.M. also said he had witnessed another resident hang himself, and provided details regarding his interaction with this resident and of his personal knowledge of the suicide.

The file assessor pointed out that H.M. had been released from Shelburne almost two years before the suicide occurred.[142] The assessor also underlined a number of inconsistencies in H.M.'s statements. Nonetheless, he conceded that H.M. had suffered some physical abuse and made an offer of $5,000. There is no explanation in the file or in the file review submissions for this position.

Counsel for the claimant submitted to the file reviewer that it is not enough for the Province to merely suggest that a claim is not believable. Convincing evidence must be brought forward to contradict the claimant's sworn statement. It appears from the submissions that the employees named in the Demand were not specifically interviewed with respect to this claim. H.M.'s counsel wrote:

> Abuse of children is a secretive crime. By its very nature, there are seldom witnesses to the offence and the survivor usually has no evidence, other than their statement, to prove the allegations. It is the survivor's word against the abuser's word. However, in this case the province has not even provided statements from the alleged abusers refuting the allegations against them. Mr. Osborne has confirmed on behalf of the province that, although statements have been taken from [employee A] and [employee B] no reference was made to the

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[142] The incident is well known as there was a Magisterial inquiry into the fatality.

> allegations of [H.M.]. [Employee C] is not capable of providing the statement because he is deceased.

In response, the file assessor noted that while there had been a tacit acceptance under the MOU that a claimant's statements were presumed to be true unless shown to be otherwise, this was no longer the case: all claims must be proven by the claimant to have occurred on a balance of probabilities, and there was no onus on the Province to bring forward "convincing evidence" to contradict the claimant's sworn statement. The assessor questioned H.M.'s credibility and submitted the only reasonable conclusion which could be drawn was that he had exaggerated his claim and lied in order to dramatize his allegations. He asserted that the Province's offer was fair and reasonable.

The file reviewer rendered his decision on June 11,1999:

> After carefully reviewing the Guidelines, video of IIU interview, detailed transcript of IIU interview, summary of IIU interview, video of RCMP interview, summary of RCMP interview, institutional records from the Department of Justice and finally, written submissions form Fergus Ford and John McKiggan, I conclude on a balance of probabilities the Claimant's demand for compensation falls under Category 10 (Medium Physical Abuse) and accordingly, I award to the Claimant the sum of $25,000.00. Moreover, I find the aggravating factor of withholding treatment contributes to his claim being a $25,000.00 award which is at the upper end of Category 10.
>
> After carefully perusing all of the evidence, I found the Claimant to be most credible. Indeed, but for the embellishment of being struck 50,000 times, I found, generally, the remaining evidence to be absent of exaggeration. Moreover, the Claimant indicated [employee D (commonly known by the residents as [nickname]) was "a good fellow" and [employee E] "was an okay guy". The foregoing added to my assessment of the Claimant's credibility.
>
> (Emphasis in the original.)

R.P., a former resident of Shelburne, claimed compensation of $90,000 under Category 2 (severe sexual and medium physical abuse). He stated that he was hit on the head with knuckles by a counsellor while standing in line, grabbed by night staff in a painful manner and told not to run away, and shoved by another counsellor. The most serious allegations were of sexual abuse by an unidentified counsellor on three to five occasions, including anal intercourse. In the file review decision dated February 8, 1999, the reviewer noted:

> In the Province's Response dated September 11, 1998, it accepted [R.P.'s] allegations of physical abuse, but categorized the abuse as minor. However, it concluded that [R.P.] had failed to prove the allegations of sexual abuse on the balance of probabilities and rejected that portion of his claim. In the result, it offered [R.P.] a settlement of $3,000 for a category 12 claim of minor physical abuse.

There is no indication in the file why the file assessor accepted the allegations of physical abuse. At least two of the employees referred to by R.P. were deceased. The other was not contacted.

The assessor submitted that the claimant's apparent inability to recall any details about the sexual abuse or identify the perpetrator who sexually abused him put his credibility seriously in doubt, and that these allegations should therefore be dismissed as unproven. However, counsel for R.P. argued that since there was no opportunity for cross-examination in the file review process, the reviewers were deprived of the opportunity to make a first hand assessment of credibility. In such circumstances, counsel submitted, the onus should be placed on the Province to come forward with evidence to refute a claim. Since the file assessor had not produced any evidence to counter the claimant's allegation, then it should be taken as proven.

The file reviewer found as follows:

> The Province's reluctance to accept the allegations of sexual abuse in this case is readily understandable. [R.P.] has provided only scant details of the abuse and cannot identify the alleged perpetrator. However, on the basis of the videotapes, which I have reviewed very carefully, I am satisfied, on the balance of probabilities, that [R.P.] was sexually abused by a member of the staff at Shelburne. I do not believe anyone who watches the tapes would have any real misgivings about [R.P.'s] sincerity or the fact that he generally has problems attempting to recall what happened to him while he was at Shelburne. Contrary to the Province's view, I find that [R.P.'s] general recollection of his time at Shelburne was sketchy and somewhat impressionistic. This is not surprising, in my view, having regard to the passage of time. Recognizing the obvious shortcomings in [R.P.'s] statements, one is still left with the sense of conviction that [R.P.] is telling the truth, as best he can, and that he was in fact sexually abused.

The file reviewer concluded that the description of the sexual abuse was so imprecise that he had to find that it was minor, bringing the claim into a lower category. Compensation was fixed at $25,000, with a counselling allotment of $5,000.

R.T., a former resident of Shelburne, claimed $25,000 for medium physical abuse. He alleged that a bus driver, whose name he believed to be employee X, had grabbed him by the throat and thrown him down at the bus stop. Another employee, Y, hit him with the back of his hand. He also claimed other incidents of inappropriate punishment and discipline.

The Response by the file assessor was that the records did not indicate there ever was an employee named X. Our review of the file reveals that the IIU contacted Y, who, in a telephone conversation, stated that he could not remember R.T., nor any such incident, and denied ever having struck any resident in such a manner. There is no indication that a formal statement was ever taken from Y. No reference was made by the file assessor to this information in the Response or to the file reviewer.. The file assessor concluded that R.T.'s claim fell within Category 12 (minor physical abuse) and made an offer of $5,000.

The claim went to file review. The reviewer noted that both counsel for R.T. and the file assessor "agreed that [R.T.] was physically abused during his stay at the Nova Scotia School for Boys in 1967 and that the physical abuse which he experienced falls within compensation Category 10 in Schedule "A" of the Guidelines, described as medium physical abuse."[143] Based on this common submission, the file reviewer was satisfied, on the balance of probabilities, that R.T. had a valid claim and that he did experience physical abuse. An award of $14,500 was granted, plus a counselling allotment of $5,000.

J.L. was a former resident of Shelburne. His Demand alleged severe sexual and physical abuse (Category 1) and asked for compensation in the amount of $120,000. The Province declined to offer any compensation for sexual abuse, but offered $5,000 as compensation for minor physical abuse. In a decision dated May 15, 1998, the file reviewer dealt, at length, with all aspects of the legal and factual issues arising from the claim. With respect to J.L.'s complaint that the process was unfair due to the lack of an in-person hearing, the reviewer noted as follows:

> I can offer sympathy for this position, but no remedy. The validity of [J.L.'s] claim is required to be measured against a test for proof – the balance of probabilities – which arose out of the requirements and opportunities of the adversarial process in our courts. That is a very different venue and it is true that it presents opportunities for evidence validation/falsification which are denied a claimant under the Program. There is, for example, no possibility for cross-examination under these Guidelines. Cross-examination is the great engine for evidentiary assessment process in our courts. As well, unlike the Memorandum of Understanding it replaced, the Guidelines do not provide a possible venue for the file reviewer to see and hear the complainant at an in-person hearing; in fact, the Guidelines are at pains to see to it that the file reviewer is isolated from the complainant. File Reviewers sometimes get a video-taped statement to review, which can assist this difficulty, but this is happenstance and did not occur in this case.
>
> There is no question but that this creates problems in assessing credibility, but these problems are quite evident on a reading of the Guidelines, and [J.L.'s] participation in the Program process is voluntary. It is an alternative to the court model which was available if he wanted. That may not present much of a choice to him, but having elected to proceed under the Guidelines, he must be taken to have accepted their evident limitations. I am bound to, and will, apply the mandated standard as best as I can in the circumstances.

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[143] The Province changed its position as to the appropriate compensation category by the time of file review. There is no indication in the file why they did so.

The file reviewer concluded that the allegations of severe sexual abuse were not established. The details of the allegations were contradicted by records from the institution, which were accepted by the reviewer. In addition, the failure to identify the alleged abuser by name caused the reviewer to draw a strong adverse inference against the claimant. In the result, he concluded that J.L. had failed, by a considerable margin, to discharge the burden of proof with respect to the alleged acts of sexual abuse. In addition, the file reviewer did not consider that a number of alleged acts of physical mistreatment were made out. He did, however, conclude that the claimant had established some physical abuse. Records from the institution confirmed that the claimant had received medical treatment. The reviewer also relied, in part, on the Stratton Report, concluding that "[t]his kind of activity by counsellors at the School was not at all unusual." In the result, the file reviewer held that J.L. had made out medium physical abuse. He awarded the amount at the top of that category, $20,000, and a $5,000 counselling allotment.

6. SNAPSHOT AS OF NOVEMBER 1, 2001

Before turning to an analysis of the final phase of the Program, it is appropriate to look at the status of the Government's response as of November 1, 2001.

According to the records examined by my staff, 45 court actions were brought against the Government by former residents of Provincial institutions. All were based on allegations of physical and/or sexual abuse said to have been suffered by the plaintiffs at those institutions. Seventeen cases have been completed, but only one of them went the length of the litigation process: *G.B.R. v. Hollett et al.*[144] It resulted in an award of $50,000 for pain and suffering and $35,000 in punitive damages. The other 16 cases were settled either through the Compensation Program or negotiations between the litigants.[145]

In Chapter II, I referred to the initial actions (and notices of action), mostly filed on behalf of former complainants from the criminal process. Apart from G.B.R., there were 12 plaintiffs who actually commenced an action.[146] Nine were settled within the Compensation Program. The remaining three were settled outside of the Program, but all within the compensation parameters and principles of the Program.

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[144] (1996), 154 N.S.R. (2d) 161; 139 D.L.R. (4th) 260 (N.S.C.A.).

[145] One of these, *S.J. v. A.G.N.S* was in the litigation process, but the plaintiff abandoned the action in November 2000.

[146] The initial group that commenced actions were *Peter Gormley v. A.G.N.S.; M.D.S. v. A.G.N.S., K.F.S. v. A.G.N.S., J.G.O. v. A.G.N.S., M.F.S. v. A.G.N.S., M.A.M, A.B., B.N., R.G., G.C., S.G. and J.F. v. A.G.N.S.*

As with Demands in the Compensation Program, claims were frequently made in litigation against multiple alleged abusers. Where the alleged abuser was Patrick MacDougall, and there was no available evidence to refute the allegation, settlement was negotiated. However, the Government would not acknowledge, or pay damages for, physical or sexual abuse alleged to have been committed by former or current employees who were available to participate in the litigation process.

As of November 1, 2001, 28 cases were still outstanding. Eighteen of the 28 plaintiffs did not attempt to make a claim in the Compensation Program. In the remaining 10 cases, the claims were either denied by the Province, or the plaintiffs opted out of the Program at some stage.

From our review of the outstanding files, it does not appear that specific employee input has been sought in the conduct of the litigation. Nevertheless, defences were filed denying the allegations of abuse. Up until August 2001, none of the named former or current employees had been contacted by the litigation section concerning the pending litigation arising out of their alleged culpability.[147] Examinations for discovery of these former or current employees have not been held.[148]

The concern expressed by the IIU and Government officials about fraudulent claims has already been referred to in this Report. In a memorandum dated September 22, 1999, the IIU reported to the Minister of Justice, the Honourable Michael Baker, that, as of that date, the IIU had referred 63 suspicious files to the Commercial Crime Section of the RCMP for investigation. The memorandum also expressed the view that there are many more suspicious files that may warrant criminal investigation but that, given the available resources and time constraints, the issue has not been pursued.[149]

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[147] It is, of course, axiomatic that if a former or current employee was named as a defendant, then he or she would have notice of the claim and the opportunity to fully participate in the litigation process.

[148] Discoveries of provincial employees were held in *G.B.R. v. Hollett* and in *M.D.S. v. A.G.N.S.*

[149] An IIU Report submitted to the Minister of Justice in December 1999 reported that 69 files had been forwarded to the RCMP, but the Report cautioned that this number was not at all conclusive as to the number of frauds perpetrated by claimants.

The RCMP indicated to my staff that, initially, it was their intention to pursue an investigation in 29 of the 63 files. In May 2001, RCMP officers met with IIU investigators in respect of a further 133 files. Fifty-seven of these were reviewed and investigations were commenced in 18. Accordingly, as of July 12, 2001, 47 cases of suspected of fraud were being investigated. By the end of October 2001, this figure was reduced to 12.

Only one charge of fraud has actually been laid, in *R. v. Burt*.[150] The case was scheduled for trial, but the Public Prosecution Service decided that the available evidence did not offer a reasonable chance of conviction. Accordingly, on April 27, 2000, the Crown offered no evidence and the charge was dismissed.[151]

There is one case where the claimant's installment payments have been suspended pursuant to the Guidelines. The claimant is said to have confessed to an IIU investigator that he had defrauded the Province by making a false claim.

It bears repeating at this point that it is beyond my mandate to make any determination as to whether or not any particular claim is or is not fraudulent, and indeed whether or not there was or was not widespread abuse at any of the various Provincial institutions.

7. SURVEY OF THE FILE REVIEWERS

In the process established by the Government to compensate claimants, the ultimate forum to determine the validity of any particular claim was file review. In the course of seeking input from the file reviewers about the Compensation Program and their role in it, we asked them the following questions:

> What assumptions did you make about the occurrence of abuse at the beginning of the process or at various times throughout? Did your views as to the prevalence of widespread abuse change from the beginning to the end?

The comments from the 12 reviewers who responded are set out below:

> 1. I did not feel it was appropriate to make any assumptions. My view is only as good as my understanding as to the number of residents versus the number of residents

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[150] This case was not referred to the RCMP by the IIU, and is not included in the 47 cases mentioned above.

[151] The Province also discontinued its civil claim against Mr. Burt for allegedly defrauding the Province.

who were abused. I did not look at the relevant statistics and do not have an informed view in that regard.

2. I knew nothing about it until I read the Stratton Report. As I proceeded I became convinced of terrible abuse in Shelburne, although at varying levels with both the same person or various individuals and only from certain employees. I heard only one case from Truro that was serious to the individual, but minor on the scale.

3. I assumed that both sexual and physical abuse had occurred over the years of operation. At the end of the Program after having reviewed 17 cases, I was of the view that there was frequent minor physical assaults (hitting, etc.) but that the large number of serious sexual claims were inflated.

4. I made no assumptions about the occurrence of abuse. I assumed that the Government accepted the conclusions of the Stratton Report and that they based their compensation process on that acceptance. The format of the MOU indicated that there wouldn't be much doubt about the credibility of the complaints.

5. I made no assumptions about the presence of abuse, and therefore my views would not change.

6. Because my impartiality was most important in assessing credibility and making a decision in each case, I made no assumptions at the outset of the process nor during the process. I do believe now that the process has concluded that there was widespread abuse at the various institutions.

7. I assumed that there was a level of abuse at Government institutions, just as there is a level of deviant behaviour in the population at large. I also had a sense that where opportunities for deviant behaviour could be coupled with authority, that there would be some individuals who would see working in these facilities as an opportunity for aberrant behaviour. I also assumed that there would be, to some degree, a reluctance on the part of employees to speak out against other employees. I am also old enough to know, at first hand, from experience in government, that there was a tendency to deal with unpleasant, uncomfortable and even illegal situations informally – witness – Patrick MacDougall.

8. I became more sceptical of the sexual abuse and more convinced of the minor to mid-range physical – with the confusion as to what was acceptable discipline of that day – i.e. – the boot room and the boxing matches. I wanted to talk to someone about this to get a better understanding. I also became more convinced of fraudulent claims! I think the ability of the file reviewers to talk might have been a help. It was a collective problem for all concerned yet each claimant was segregated in the approach. For example, I had 5 to 8 files of sexual abuse by MacDougall. I never knew the type of sexual predator he was or his physical size etc. It looked at times like he was a stallion. I had a vision of a giant of a man with overactive hormones. I wondered at his professed stamina. I wondered if there were other files with the same allegations. I saw the harmony of my file, but lost it in terms of the harmony of the institution and other conditions. I may have felt different if I knew dozens claimed of sexual abuse by the same person at the same time. That is not possible,

yet for one person to make a claim of that magnitude is. I lost the perspective of the total institution and kept going back to the Stratton Report for that feeling!

9. As a lawyer who has dealt with a large number of young people who have been in institutional settings I recognize there are occurrences of abuse. This assumption would have been with me at the start of my duties as a file reviewer. I was also mindful that societal values have changed over a period of twenty (20) years and what may well have been the norm in my childhood to deal with an undisciplined child, would constitute an assault in contemporary society. As my involvement in the Program continued, it was apparent that due to the sheer number of claimants alleging multiple incidents of sexual and physical abuse, there would have to be staff members at institutions who spent twenty four (24) hours a day, seven (7) days a week sexually molesting and physically abusing the young people under their care. Obviously, that type of prevalence would be impossible and clearly many of the claims were false. I would also assume, based upon my experience as a criminal lawyer, that given the opportunity of "free money" many people who were part of the criminal lifestyle would eagerly come forward to lay a false claim about their time in an institution. Clearly this would have been an experience which they probably hated, and alleging misconduct at the hands of staff, who they also probably greatly disliked or resented, would not be a difficult exercise. It would be extremely naive not to fully expect this.

10. I didn't make any general assumptions about the terms of abuse at the institutions at any time in the process. Consequently, they really didn't change. I tried to keep an open mind on this, but in retrospect, after having completed the Program, I would think the abuse could not possibly have been as widespread as all the allegations seemed to support.

11. I must say that I became rather more cynical and sceptical as the claims rolled in. Some claims, such as those made against staff who were not at the institution at the same time as the claimant, were obviously false, yet the apparent sincerity of the claimants was not different from that of other claimants.

12. I didn't make any specific assumptions about the occurrence of abuse. I had read the Stratton Report and accepted that there certainly had been instances of abuse. I had no real idea to what extent the abuse was widespread or who the alleged perpetrators were other than Patrick MacDougall.

8. STATISTICS

Databases were maintained by the IIU and the Compensation Program office. From these, my staff has compiled some statistical information about the Compensation Program. However, I note at the start that because these databases were created for different purposes and maintained by separate offices, it is impossible to completely reconcile some of the numbers. Indeed, as previously mentioned, variations exist between different reports from the same databases which are difficult to reconcile. It is, therefore, important to bear in mind that some of the figures which are set out below are not necessarily precise.

The Fox Pro database maintained by the IIU shows that 1,487 individuals notified the Province of their intention to submit claims under the Compensation Program. Some did not proceed, others withdrew, and some were found to be ineligible. A breakdown according to residential institutions shows that 1,282 were former residents of Shelburne, 145 had resided at the Nova Scotia School for Girls and 59 were from the Nova Scotia Youth Training Centre. One was resident at an ineligible institution.

The database maintained by the Compensation Program office showed the total number of potential claimants (as of the cut-off date of December 18, 1996) to be, in various reports, 1,451, 1,454, 1,455, 1,457 and 1,459. In all, 1,246 claims were processed by the Program.[152] Due to the considerable overlap in the categories, it is impossible to discern the number of claims of sexual, as opposed to physical, abuse. Nor is it possibie to reliably determine the severity of abuse claimed, other than by dividing the claims into the highest and lowest prescribed categories. Nine claimants received awards for severe sexual abuse (Categories 1 and 4) and 399 were compensated for minor physical abuse (Category 12).[153]

The IIU office closed on October 31, 2001. In total, reports were completed on 68 current employees. In 66 reports, the IIU concluded that none of the sexual or physical abuse allegations had been "substantiated." The IIU documented 17 incidents where force had been used by current employees towards residents. All of the incidents had been documented in reports and addressed at the time by management at the relevant institution. The uses of force either were deemed appropriate or resulted in cautions or verbal reprimands to staff.

There were two instances, one in 1996, the other in 1998, where the allegations were held to be valid. In both instances, the Province moved to formally impose disciplinary sanctions. One employee, who had failed a polygraph examination, was dismissed in April 1998. He grieved his dismissal, but the matter was settled prior to the arbitration hearing. The other employee was Roy

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[152] In addition, the Program turned away approximately 239 claimants on the basis that they were not eligible.

[153] Category 12 is for minor physical and/or sexual interference with a range of $0-$5,000. Without examining each file it is impossible to indicate how many of these files involved allegations of only minor physical abuse.

Mintus, who was dismissed on December 13,1996.[154] As noted in Chapter II, Mintus filed a complaint with the Labour Standards Tribunal that his discharge was without cause. The complaint was heard over 13 days from May 1998 to March 1999, and the tribunal upheld the dismissal.

To date, Operation HOPE has forwarded briefs with respect to sexual and physical assault allegations against 11 former or current employees to the Public Prosecution Service for possible prosecution. The Service has not yet made any decisions in that regard.

9. COSTS

The cost of the Government's response to reports of institutional abuse has been significant. Below I outline some of the known costs associated with the Compensation Program, as reported by the Department of Justice on November 30, 2001:

Salaries	$2,994,862
Other administration	$954,617
Awards to claimants	$30,006,485
Counselling	$7,607,167
Legal Fees	$4,573,794
Family Services Association	$1,440,596
Other Professional Services	$1,819,802
IIU	$7,686,485
Shelburne EAP[155]	$4,002,997
Total	$61,086,805

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[154] Some of the evidence against Mr. Mintus that led to his dismissal was originally uncovered by the 1991 RCMP investigation regarding the NSSG, but was unknown to the Department of Community Services until after the Stratton Report was released.

[155] This refers to the Employee Assistance Program described in Chapter XIV.

10. ANALYSIS

This chapter describes the continuation of the Government response, most particularly the Compensation Program, up to the present. Since the flaws in the Program discussed in this chapter have largely been outlined in earlier chapters, the analysis here is brief.

After the Guidelines were introduced, the validation of individual claims remained problematic. Some claims continued to be dealt with without any input from available employees against whom allegations were made. The polygraph continued to be used – not inappropriately – in the investigative process, but at times assumed undue prominence and substituted for a full and thorough inquiry. In fairness, this criticism should not be visited upon the investigators, given their limited resources and the time constraints associated with their tasks. The investigation of claims continued to reflect many of the shortcomings identified in Chapter XI.

Claims that made their way to file reviews revealed serious flaws in the process. Two need to be elaborated upon here: the use of polygraph results and the abolition of in-person hearings.

There was no consistency in approach by file reviewers to the use to be made of polygraph results. Some gave these results little or no weight, sometimes relying on their inadmissibility in court; others appeared to confer some weight upon the results.

In my view, this inconsistency reflected a larger failure of the Program to take adequate measures to ensure some consistency, both procedurally and substantively, in the approaches taken by file reviewers to their duties. Such measures, compatible with the independence of file reviewers, are outlined in Chapter XVIII.

However, the inconsistent approaches taken to polygraph results also reflected the inherent illogic of utilizing polygraph results to assess the credibility of individuals who had no opportunity to appear before, or be questioned by, the file reviewers.

Although the rationale for abolishing all in-person reviews was not clearly spelled out, it is obvious that the Government adopted this approach, in part, as a way of purportedly reconciling the inability of employees to attend file reviews with basic fairness. In other words, it was felt that the inability of employees to appear in person made the exclusion of claimants justifiable, while remaining true to the underlying objective that adversarial litigation be avoided. (Some also felt that the abolition of in-person hearings avoided unjustified appeal to emotion. I do not regard this as a valid reason to abolish in-person hearings.)

The decision to abolish in-person hearings was, with respect, unwise and inappropriate. First, an ADR process that excludes claimants, including true victims of abuse, from any right (if they so choose) to meet with the fact finders is likely to fail. It is incompatible with principles of respect for true victims, and their engagement in a process intended to provide them relief, which principles are fundamental to the success of any redress program. Indeed, an opportunity to be heard may be critical to the healing process for some abuse victims. I further address these and other such principles in Chapters XVII and XVIII of my Report.

Second, fairness for affected employees could be addressed by enabling them to appear before the file reviewers in a way that remained compatible with the desirability of avoiding unnecessary or gratuitous harm to true victims of abuse. I discuss how this can be done in Chapter XVIII. The claimants' lawyers themselves recognized this in their early proposals to the Government on how the Compensation Program could include a time-limited arbitration process.

With respect, it is inconceivable that employees would feel that the process had become fair because they were no longer the only parties who could not appear before the file reviewers to make their case. This is particularly so given their exclusion from the design of the process, their limited knowledge of what was happening within the Program or at file reviews, and the extensive awards (and, they presumed, the findings) that had apparently already been made by these same file reviewers from the Program's inception. As well, although claimants could no longer appear in person before the file reviewers, their counsel (unlike counsel for the employees) continued to represent them at file reviews and make representations on the claimants' behalf. So as not to be misunderstood, this is not to say that an ADR process must include counsel for the employees – a position with which I do not agree – but only to say that the abolition of in-person reviews did not address the fairness problems intrinsic in the process, or even the appearance of unfairness.

Third, the assessment of reliability and credibility should generally not be done through a paper review, or even a paper review supplemented by some videotaped interviews. There is a wealth of jurisprudence that establishes that triers of fact who have observed the witnesses are well situated, unlike appellate courts, to make findings of credibility. As a result, these findings are accorded great deference on appeal or judicial review.

I recognize, as I have earlier expressed, that undue importance should not be given to demeanour in the assessment of credibility. Indeed, one of the points which I made in the Report of the Commission on Proceedings Involving Guy Paul Morin *had to do with the dangers associated with undue reliance upon demeanour, which is too easily misinterpreted in the evaluation of truthfulness. Mindful of that cautionary note, the demeanour of a witness nonetheless has relevance* *to the assessment of credibility. More importantly, the ability of the fact finder in an ADR process to focus the witness on areas of concern, confusion or ambiguity, and to obtain answers that are directly relevant to the issues to be resolved, is critical to the assessment of credibility. This is especially so where there is no right of cross-examination by an adverse party. The file reviewers who responded to our questionnaires almost uniformly held the view that the abolition of in-person file reviews was a regressive change that made their assessments of credibility more difficult. One also commented on the difficulties in poring over hours of unfocused, often irrelevant videotaped interviews.*

Apart from these concerns, my examination of the file review process during the post-Guidelines period also revealed that file reviewers were, at times, confused or took fundamentally different approaches to how claims should be assessed within the regime of an ever-changing ADR process. It is true that the burden of proof was now explicit and provided some direction. Some file reviewers regarded this as a change; others saw it as confirmatory of what was implicit in the process itself. However, file reviewers continued to struggle with how assessments of credibility should be made, not only in light of their inability to observe the interested parties first hand, but also within an ADR regime whose mandate and philosophical perspective became unclear. I found it significant that a number of file reviewers became more sceptical about the prevalence of abuse – particularly sexual abuse – as they reviewed more and more claims, which understandably caused them some difficulty in how they were to approach future claims; in how, if at all, they could draw upon what they had purportedly learned through prior file reviews; and in the extent to which they could rely upon the purported findings contained in the Stratton Report. The changes in the Program failed to provide them with adequate answers.

As the Compensation Program wound down, it left in its wake true victims of abuse and innocent employees, both victimized by its flawed approach to validation, and a public which could not know, and may never know, the nature and extent of abuse within the Province's youth facilities.

The Government's response also exacted a heavy financial toll upon the Province's coffers. I earlier cast doubt on the projections made by the Government of the costs of alternative responses. It is unnecessary, and probably impossible, for me to now quantify what reasonable, alternative responses would have cost. Suffice it to say, I am far from convinced that the Government's response could reasonably be regarded as having saved the Government money, when compared to alternative responses available. More to the point, I am satisfied that the human costs incurred by the Government's response, resulting in large measure from the lack of a credible, fair and legitimate validation process, cannot justify the response, whatever the financial savings might have been.

Searching for Justice

An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse

VOLUME TWO

The Honourable
Fred Kaufman, C.M., Q.C., D.C.L.

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XIII

Impact of the Compensation Program

1. IMPACT ON CLAIMANTS

As noted before, I spoke with a number of claimants. My discussions with them were intended to sensitize me to the impact, positive and negative, which the Program had on many of them. Their views helped me to evaluate the Program and make recommendations for the future. I have little doubt that the Program provided significant assistance to many true victims of abuse.

Not surprisingly, there were some differences in the views of claimants on the Program. However, I was able to identify certain recurring themes in their discussions with me.

Almost all regarded a compensation program, in principle, as a desirable alternative to traditional litigation. Very few would have pursued traditional litigation had a compensation program not been available. Fear of being publicly exposed as a former resident was often cited in support of their reticence. For example, one said: "I hadn't talked about it with anybody and wasn't about to bring it to the public eye."

Generally, the claimants regarded the amounts of compensation as fair. Indeed, some, previously of limited means, clearly regarded their awards as ample.

A number of claimants thought the Government's change from lump sum to periodic payments was fitting. Many recognized that periodic payments were more likely to prevent misuse of the compensation. A number were aware of others who "blew the money" on drinking, drugs or gambling. One said that "a lot of people misused [the money] and aren't a whole lot better off." Several claimants, however, felt that a blanket rule was unfair, particularly to those who intended to purchase a house rather than squander the funds. They suggested that the Program should have shown some flexibility to accommodate individual cases. One suggested that psychological testing could have determined who could cope with lump sum payments and who could not.

Many represented that they did not enter the Program for the money. A variety of motives were articulated. The importance of being believed or vindicated was the most common reason cited. For example, one claimant remarked: "The fact that somebody would listen matters as much to me as receiving the money." Another claimant received only $6,000, but felt that "the letter that they believed me was what was important." That said, claimants generally did welcome the financial awards and many shared how they had improved their lives, sometimes dramatically, as a result.

The most common theme of my discussions with claimants was the importance of the counselling they received. Although some claimants did not avail themselves of the counselling, many did. Almost uniformly, they regarded it as the most beneficial part of the Program. Several remarked that the counselling, not the compensation, made the difference. One suggested that, given the apparent fraud in the Program, the Government would have been better off giving counselling only, rather than financial compensation.

Claimants described the positive influence that the counsellors had in reducing their emotional distress and trauma. Some had been suicidal or drug abusers. Many had been unable to speak with anyone, including family members, about the issues before. One said that, without the counselling, "I wouldn't be here today."

Several claimants presently in custody reflected that they could share their feelings with the counsellors without fear that their statements would be used against them in the institution. They contrasted outside counsellors with their institutional counterparts.

Claimants were also highly complimentary of the assistance afforded by Elsie Blake at the Family Services Association. Dr. Blake was often the individual who directed them to their counsellors and provided them with other support.

Concern was expressed that some of the counselling had to be directed to the distress occasioned by disappointments in the Program itself. The funding allotment for counselling was not increased to address this concern. On the bright side, many advised that their counsellors continued to see them even after their counselling allotment was exhausted.

There were other criticisms directed towards the Program. A number regarded their interviews by Internal Investigations Unit ("IIU") as accusatory and, at times, hostile. Claimants felt that they were presumed to be guilty of fraud and not treated with respect. The investigators sought to trip them up on trivial matters and suggested they were lying. Several were upset that the investigators knew them from previous encounters. In fairness, not all of them shared these views. Those that did often contrasted their treatment by the IIU with how they were treated by the Murphys and, sometimes, the RCMP. None complained about the Murphys. Most regarded the RCMP as courteous and professional.

A number described the Program as exceedingly slow. Extended delays increased their levels of anxiety.

Some were very upset at the suspension of the Program. One thought that, rather than suspending it midstream, a better investigation should have been done up front before the Program got underway.

Some claimants regarded the changes to the Program as unfair. Reasons cited included the inability to meet directly with the file reviewer and the newly perceived presumption that claimants were all liars. One said: "I thought it was really unfair that my file review was in writing. I was very offended that I didn't get to talk to my file reviewer. I felt I had the right to speak up for myself."

Several claimants regarded the offer to take the polygraph as a signal that they were not believed.

At least one claimant said that he would not have given a statement to authorities had he known what the Program entailed. Another said that the "Program was worse than the abuse."

One individual regarded the Program as insensitive to Afro-Nova Scotians. He believed that agencies in the black community should have been contacted to provide counselling, that complaints of institutional racism were not taken seriously, and that consultations should have taken place with the Mi'kmaq, Afro-Nova Scotian and Acadian communities respecting the design and implementation of the Program.

Interestingly, when the involvement of employees in the process was discussed, a number of the claimants accepted that fairness dictated that the employees be heard. They appreciated the need for verification of complaints.

Most recognized that some claimants had defrauded the Program. Indeed, a number provided examples of others who, to their knowledge, had done so. For example, one claimant described another individual who had persuaded his mother to lie about his claim. The claimant concluded:

"A lot of people abused [the Program]. They could use the same name of the person who others said had abused them ... It makes it bad for everybody." Another reflected that "there were a lot of people who said things that weren't true. People told [me] they had stretched the truth." Yet another described someone who made a false claim and received a large settlement. She stated:

> That's what hurts. There were so many lies and thieves, only thinking about how they were going to get the money. It ruined the process for people like me who could prove their claim. They weren't listening anymore.

One claimant knew a couple of people who were "stretching the truth." He advocated "going after [people committing fraud] if you can prove they are fraudulent claims." However, another claimant felt that the extent of fraud was exaggerated: he was now scared to reveal his involvement "because you were looked at as a fraud artist or druggie."

A number of claimants recognized that fairness and the need to avoid fraud compelled a proper verification process:

- "You can't give out a whole bunch of money without investigating."
- "The perpetrators should have had a say in this. Fair is fair. Everybody has the right to try to defend themselves. Maybe there were a lot of people who were innocent."
- "I think everybody including the employees should have an opportunity to be heard."

Despite perceived deficiencies in the Program, the prevalent view was that its benefits outweighed its flaws. A number of claimants felt they were treated fairly and credited the Program for notable successes in their lives. One claimant had grown up in foster homes, having endured alcoholic parents. He had been sent to various institutions from early childhood, placed in group homes and hospitalized for mental health issues, including suicidal behaviour. He and his counsellor advised me that he was now in a stable group home, his self-worth had been enhanced through compensation and his anger and suicidal thoughts were very much reduced. He had enrolled in an adult literacy program. Another claimant indicated that the compensation changed her whole life. She was able to buy a house. It took her off mother's allowance. She is no longer on drugs or alcohol. These positive accounts were far from unique.

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2. IMPACT ON EMPLOYEES

In this section of the Report I document some of the ways in which the Program has impacted on employees and their families. In my view, the Program's design and implementation deeply hurt past and present employees. It contributed to a number of employees being falsely implicated as abusers. The impact on their lives and the lives of their families may be incalculable. Like my sessions with claimants, my discussions with employees, their families and their treating therapists, enabled me to identify the Program's flaws and make recommendations for the future.

(a) Dr. David Syer

Dr. David Syer, a psychologist, provided valuable insight on the impact of the Government response on employees and their families. Shortly after a staff member at Shelburne committed suicide, he was asked by then Superintendent Heikki Muinonen to assist staff in dealing with the event. Then, as the Government response to reports of abuse further affected employees, Syer was asked to help develop a protocol for staff against whom abuse was alleged and to provide psychological support and interventions where possible. As a result, he has worked directly with 47 employees and their families. These individuals have expressed deep gratitude for Dr. Syer's interventions. Indeed, some believe that they owe their lives to him.

In submissions to the review, Dr. Syer described those aspects of the Government response that had an impact on the employees and how that impact was manifested – in the deterioration of their physical and emotional health, their standing in the community, their future employability and their interpersonal, community and workplace relationships.

In his submissions, Dr. Syer was highly critical of the Government's response and the role of the employees' union (the NSGEU). Those criticisms – forcefully expressed – are reproduced in the passages that follow. Elsewhere in this Report, I address a number of these criticisms. Although I do not agree with every criticism – or all of the motives ascribed to Government or union officials – I adopt a number of them. Suffice it to say that Dr. Syer has captured the perceptions of employees, and I accept, without hesitation, his description of the physical and emotional symptoms exhibited by employees throughout the Government Program.

Dr. Syer began by describing the tremendous stress experienced by employees and their families. In his view, this stress was attributable to, and compounded by, two circumstances: unpredictability surrounding the Program, and the employees' sense of embattlement.

Dr. Syer explained unpredictability in the following terms. A person accused of wrongdoing derives a degree of comfort from his or her confidence in due process. The existence of due process provides structure in which one can defend oneself and within which one may develop a strategy of coping with emotional pressures. In the employees' view, the Government's response did not adopt a structure which provided due process to the employees. Dr. Syer contended that the absence of such structure led to inordinate levels of stress, which was compounded by the number of unknowns and, at times, cynicism regarding the competency, motivation or intentions of those who devised and administered the Government response. The failure to use established legal practices removed the security that comes with a predictable legal system. It also inadvertently disrupted a complex network of other systems relating to employee rights and support services.

In Dr. Syer's opinion, implicated staff were dealt with inconsistently. Some were compelled to leave the workplace, while others with serious allegations against them were permitted to remain. Some staff were initially encouraged to leave the workplace by taking advantage of short term sick benefits. Government officials may have felt that the situation would be resolved fairly quickly. Staff were then encouraged to apply for long term disability benefits. This was questionable in the eyes of the insurance company and many employees were reluctant to be regarded as disabled. Nonetheless, staff were faced with the alternatives of cessation of pay or returning to a workplace now felt to be hostile, dangerous and unhealthy. Some returned to work with disastrous emotional consequences. Others suffered financial hardship when they could not return to work, even though they were not deemed disabled.

In Dr. Syer's view, "this chain reaction of failures" in the system resulted in loss of confidence and security. The Government and the union did not have appropriate mechanisms in place to provide relief to these employees. It was no excuse that the Department of Justice ("Justice") might have been on a learning curve. That did not justify poor practices, *ad hoc* decisions and reckless actions, leaving employees perpetually uncertain of their positions. A formal grievance was eventually launched by the union, but Dr. Syer believed that the resulting Memorandum of Agreement ("MOA") continued to leave large gaps where employees' treatment remained uncertain, arbitrary and unpredictable.[156]

As for the notion of embattlement, Dr. Syer believed that public statements by Government ministers, bureaucrats, media, judges and lawyers created an atmosphere that led the public to believe that the allegations made against employees were certainly true. Government apologies to claimants, substantial payouts of compensation, and statements by Justice that employees had been removed from their positions, all contributed to this notion. So did comments that the RCMP was now involved in one of the largest investigations ever. He stated:

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[156] The Memorandum of Agreement is described in the next chapter. It was an agreement intended to offer benefits to employees who had been cleared of misconduct, such as the opportunity to change positions within Government, transfer to the private sector or take early retirement.

> Clearly the staff felt that they were confronted with an assumption of guilt rather than innocence and that they were targeted by very powerful public institutions with virtually no support and no recourse to the courts. For those still employed, to speak out was to risk dismissal. To protest one's innocence was futile. To question or resist what to many appeared to be an illegitimate process, was to reinforce the assumption of guilt. To question the veracity of the allegations being made was to further victimize the 'victims.'

According to Dr. Syer, the Government never took the initiative at Shelburne to inform staff of their rights, or of the importance of the presumption of innocence and relating to accused co-workers in a non-judgmental and supportive way. An atmosphere of negativism, judgment and exclusion developed very quickly and was, if not fostered, certainly not discouraged by senior management. This had the effect of further increasing employees' anxieties about the objectivity and intentions of management. Dr. Syer felt that his own experience with senior Justice officials confirmed that staff were seen as guilty of massive abuse and a conspiracy to cover it up. He asserted that there has been no public statement from the Department of Justice regarding the possibility of innocence or the need to reserve judgment. Even with overwhelming evidence of large scale fraud, the Department has made no gesture of support for staff. The release of the IIU Report occurred despite resistance on the part of Justice.[157] In Dr. Syer's view, its conclusions, available to the Government for a number of months, could have offered a degree of relief and comfort to staff.

Dr. Syer described the mind-set of employees. They were mindful of the miscarriages of justice and hysteria that are spawned by allegations of child and sexual abuse. Thus, they saw it as inevitable that perpetrators, in appropriate numbers, would have to be identified, albeit without justification. They believed that the Program, and even changes to it, were driven by costs. The grief and distress of innocent employees counted for little in the minds of the authorities. The employees' concerns were dismissed with the attitude that 'you will have your day in court if you are charged.' According to Dr. Syer, it is small wonder that employees felt embattled.

The employees felt that the NSGEU only came to their support belatedly and in a half-hearted manner. Many members thought that the union was fearful of being perceived as supportive of abusers, and therefore was not as active as it should have been on behalf of employees.

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[157] This Report is reviewed in detail in Chapter XV. In brief, it was highly sceptical of the veracity of many claims made in the Compensation Program.

Having outlined what aspects of the Government response 'stressed out' employees, Dr. Syer described the effects of prolonged stress. These include: high blood pressure, sleep disturbances, heart failure, increased risk of stroke, increased vulnerability to disease, fatigue and tremors, muscle aches, back pain, headaches, gastric distress, nausea, elimination disorders, loss of appetite and other eating disorders, suppression of sexual drive, interference with interpersonal relations and enjoyment of life (including social withdrawal), loss of motivation or confidence, marriage stress and failure, preoccupation with stresses, exhaustion, generalized anxiety, frequent feelings of rage, despair, fear and suspicion. Employees and their families report many or all of these effects, including strokes, diabetes, high blood pressure and gastric disorders.

Dr. Syer further reported that when ordinary beliefs and faith in society's fundamental fairness are undermined, an individual's feelings of helplessness and disillusionment can be overwhelming. Numerous staff have expressed the idea that they will never be able to regain their sense of confidence in society. Some have been diagnosed with major depressive and post-traumatic stress disorders. There have been several hospital admissions to prevent suicides. Some employees have experienced permanent personality changes.

According to Dr. Syer, those who have continued to work for the Department of Justice remain vulnerable. Those who have retired, or will soon retire, carry disillusionment, loss of pride in their career, suspiciousness and bitterness, possibly forever. The taint of an accusation of child abuse will always be with them, regardless of their ultimate exoneration. The future for those who have been unable to work looks bleak. After six years under a cloud of suspicion associated with allegations of abuse, their prospects are grim. Indeed, re-entry into the workplace is extremely difficult after a lengthy absence alone. For those working outside of Justice, the prospects may be better, but the matter is constantly in their consciousness and affects their confidence.

Dr. Syer observed that these people must also contend with ongoing arrest and interrogation by police[158] and "heavy handed intervention" by the child protection agency. As well, to gain some sort of financial security under the MOA, staff must remain under the control of those who they feel have betrayed them and done them harm. Thus, they remain vulnerable. Dr. Syer did feel that the MOA served a good purpose in the beginning. It tried to relocate people. But it has not worked well in practice. People have been left insecure in their positions, moved about, and sometimes given menial jobs.

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[158] As explained below, the RCMP apparently adopted a policy in Operation Hope of formally arresting suspects before interviewing them, even though charges might never be, and thus far never have been, laid.

In Dr. Syer's opinion, many efforts of individual staff to return to or remain in the workforce will not be successful in the long run. Most, if not all, are extremely fragile and may be effectively unemployable. For those without financial security, the risk of physical and emotional breakdown is unacceptably high. In his view, an appropriate resolution would involve accountability for those responsible for the Program and fulfilment of the Government's duty to ensure employees' financial security in the future.

(b) Dr. John Keeler

Dr. John Keeler, a general practitioner in Shelburne since 1985, has provided psychotherapy to some of the employees. He indicated that some have not coped well at all. He has observed overwhelming frustration, a tremendous sense of hurt and, for all, a feeling of abandonment. Some felt shame from having been targeted as paedophiles by media and the Government. One individual was deeply upset when it was suggested to him that he might not be allowed to be in the presence of children, even his own granddaughter. Another was more philosophical, but expressed anger and the need for restitution. Dr. Keeler described a suicidal episode, employees on anti-depressants and one young man suffering a stroke. In his view, employees have generally been unable to get on with their lives. The sexual assault allegations have had a tremendous effect. Employees cleared of some allegations are concerned that more are forthcoming. Interviews by the RCMP on short notice provoked a lot of anxiety.

(c) The Employees and their Families

My meetings with employees, past and present, together with some of their family members, were deeply unsettling. The impact of the Government response upon them was profound. Indeed, the view was expressed that words were inadequate to describe the impact of the process: "There is nothing I can ever do that can make you or anybody else feel what I have felt." Their descriptions resonated with those provided by Drs. Syer and Keeler.

Employees focussed on aspects of the Government response that most particularly affected them. A common theme was their exclusion from the process and its secretive nature. Also of concern was the fact that payments were being made to former residents without any input from the employees. Guilt was presumed.

One employee described his demoralization by the Government response. He had suicidal thoughts, avoided appearances in public, and lost interest and energy in activities. He even found himself pushing his young granddaughter away, feeling uneasy holding her on his lap given the allegations against him. He remained angry and bitter that his own employer had done this to him without proof. He described the process as "a long journey into hopelessness."

Another employee said the message from the Compensation Program was that "because I worked at the school, I'm an abuser. It enrages me and scares me that this can happen." Yet another felt that he was guilty until proven innocent, particularly since the claims were paid out before he was asked about them.

A number of employees cited the lack of due process associated with the Government's Program:

- "The Government incited people to commit fraud without proof. Little input was sought from [me] on these allegations, despite my ability to comment on them."
- "Anyone accused of a crime has the right to know the accusations and face the accuser. By design, the employees were denied these things through a secretive process."
- "The worst kind of sexual offender has the opportunity to be heard in court before his name is added to a [sexual abuse registry]. Even this opportunity was taken away from us."
- "[The Program] took away any ability to show that I was not an abuser."

One employee described himself as "just a dollar sign for many people." Another described his humiliation in being moved out of the institution where he worked without cause, and being 'red circled' as someone who would never be moved upwards. While he was awaiting transfer elsewhere, he had heart palpitations, was depressed and angry. Because he was moved, people said that he must have been an abuser. He had to resign from community activities, found it impossible to shop publicly for two years, became physically ill and came close to suicide. Promising placements fell through. He felt he was under a cloud of suspicion.

The fact that former residents were being rewarded for fraudulent allegations was contrasted with the employees' plight:

> Former residents drive about in flashy new cars and trucks that we can't afford. Crime pays. Judges give lighter sentences when abuse is [falsely] claimed. Bad behaviour is being rewarded.

Many employees described the physical and emotional effects of learning of specific allegations of abuse being made against them. The hurt was said to be enormous. Though employees came to expect these kinds of allegations, nothing could adequately prepare them. One employee said he ended up crying in his wife's arms when he tried to tell her about the claims.

Employees facing allegations were often desperate, afraid, depressed and suicidal. Some were well-supported by their families; others were distraught by the lack of support. Some cannot hold their grandchildren in their arms without thinking of the allegations. One said: "This stigma of sexual abuse is so powerful and the suggestions so pervasive."

In Nova Scotia, the RCMP apparently followed the practice of formally arresting suspects before interviewing them, even though charges might never be laid. Indeed, all current and former employees who were arrested and questioned by the RCMP in the present investigation were released immediately after the interviews. Some employees described the stigma associated with being a law abiding citizen arrested by the police. Some had heart palpitations when the RCMP contacted them. One reflected that he resented being arrested on a false claim. He is angry, outraged and unable to sleep. He said he was physically fit when he retired and had plans for the future. That was taken from him.

The RCMP were accompanied by child protection workers who investigated whether children were potentially at risk from suspected employees. This inquiry, years after allegations first surfaced, was deeply humiliating to employees, some of whom are themselves grandparents of small children.

Several also cited media accounts quoting the RCMP to the effect that thousands of charges would be laid against hundreds of employees.[159]

A number of employees pointed out that allegations were shown to be fraudulent. Nonetheless, the Program continued. This was an obvious source of frustration, desperation and anger.

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[159] An issue later arose as to whether those media reports accurately reflected what the RCMP had to say. It is unnecessary for me to resolve that issue.

Another common theme in my discussions with employees and their families was the uneven treatment of employees accused of abuse. They said there was no consistency in who was asked to leave institutions and who was allowed to stay.

A related theme was the absence of support from the employees' own union. Indeed, several employees have now sued the NSGEU for alleged breaches of its obligations to its members.[160] One allegation is that the union instituted the MOA without consulting the members or allowing them to vote. Employees also cite the failure of the MOA to rectify their plights.

Employees have had potential criminal charges and disciplinary proceedings hanging over their heads for years. The seemingly endless duration of the process, without resolution and without meaningful exonerations, represents a constant source of stress. One person asked: "Are we going to go to our graves and not be exonerated?" Another said that he would never live down his role as a counsellor at Shelburne:

> We don't remember Mount Cashel for their fishing communities. We remember them for abuse, true or false. No amount of exoneration, no amount of public outcry will wipe that slate clean.

A number of longstanding employees indicated that they had been proud of the work they did. Now, some do not want it known that they had worked at Shelburne. The Government Program was said to have destroyed lengthy careers. One indicated that the events have made it more difficult to fight cancer and high blood pressure. He is preoccupied with the allegations, instead of his retirement. Another told his wife: "Don't put it in my obituary that I worked there." Yet another indicated he had removed the reference to Shelburne from his résumé. His brother assumed he must be a pervert because he had worked at Shelburne. As a result, he now has no contact with his brother's family.

Many reflected a fundamental loss of faith in Canada and the justice system. One senior employee's view of the world has changed. He regrets moving to Canada. He no longer regards Canada as a civilized, just society. He has moved his family, disconnected his telephone and abandoned volunteer work in the community. He described stroke-like symptoms, little initiative, indecision, slowness to recover from illness, lack of concentration, and sudden feelings of anxiety and fear. Another employee accused of abuse was told that he had to cease any volunteer work, even work involving adults. He felt he was scarred for life in his community.

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[160] *John Bingham et al* and *Nova Scotia Government Employees Union*, August 24, 2001, S.Y. No. 443.

Employees and their families sometimes likened their experiences to those of people with terminal illnesses. They have no sense of security or optimism for the future. A number broke down as they described the impact of the process upon them.

Employees' descriptions of their physical and emotional problems parallelled Dr. Syer's observations. Examples cited by the employees included strokes, serious depression, eating disorders, alcohol abuse, panic attacks when near children, and contemplated suicide.

Generally, the employees were extremely bitter about the Government's response to reports of abuse. One was less embittered, not blaming his employer but instead recommending that money should never be paid 'up front.' He suggested that money should only be awarded after judicial proceedings. He concluded: "The road to hell is paved with good intentions."

3. IMPACT OF MEDIA

It is relevant to add that the plight of innocent employees, as well as the distress of true survivors, was greatly exacerbated by frequent stories in the press. As a recent study pointed out, the two leading papers in Halifax did not always see eye to eye. Writing in the *Ryerson Review of Journalism*,[161] Bob Sexton, a recent graduate in journalism, concluded that, "[i]ntentionally or not, the two Halifax dailies ended up on opposite sides of the abuse issue."

Sexton gave a number of examples of press reports to support his view. For instance, in reference to the IIU Report, the *Chronicle-Herald* carried a headline on September 12, 2000, stating "Compensation Triggered False Abuse Claims – Report," while the *Daily News*, five days later, referring to the same document, said "Report Has No Evidence of Massive Fraud." While these headlines are not necessarily contradictory, they do reflect divergent attitudes, and the reader who scans headlines only will be left with a different view depending on which paper he or she saw.

Both claimants and employees who met with me told of the impact of the media on them.

A number of employees described the devastating public references in the media to employees as abusers, perpetrators or accused. One commented that "the media has portrayed the employees as monsters, predators, perpetrators, paedophiles. Shelburne was described as paradise for paedophiles." Another employee's spouse stated: "The media started out referring to 'alleged perpetrators.' Now the 'alleged' has been dropped." She said that everybody hates a paedophile. These were to be the happiest years of their lives, spent with grandchildren. Instead, their lives have been destroyed. She feels totally vulnerable. She could not understand how this could happen in Canada.

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[161] Summer 2001, p. 22.

As the existence of potential fraud by some claimants gained currency in the media, claimants too felt that they were being tarred with the brush reserved for 'con artists.'

4. ANALYSIS

Not surprisingly, many of those reading this Report will hold highly divergent, indeed polarized, views on the Government response and, in particular, on who was truly victimized by it. It is, therefore, important to say at once that the Program has left in its wake both claimants and employees who have been damaged by it. As I reflected earlier, my mandate does not permit me – nor did I have the means – to quantify how many claimants were truly abused or, on the other hand, how many employees were falsely implicated. I have no doubt that there were claimants who were truly subjected to physical and sexual abuse. Not even the most cynical observer of the Compensation Program can reasonably challenge that proposition. Similarly, I have no doubt that there was a significant number of employees who were falsely implicated.

One of the challenges of any Government response to reports of institutional abuse is to ensure that the lives of true victims of abuse are enhanced without, however, destroying innocent employees and their families. This requires balance, something the Nova Scotia response lacked. As stated elsewhere, the Government response was skewed against the employees to an extent that the innocent were deeply hurt, sometimes irreparably. Then, as the Government revised the Program, trying to provide some balance, true victims of abuse sometimes suffered.

The media coverage exacerbated the problems caused by the Program. It is not my role to pass judgment on which media accounts were accurate and fair and which were not. Nor do I intend to tell the media how to do their job. But it is important to stress that strongly held views by reporters and columnists, sometimes expressed in strong language, may have caused unnecessary hurt to people who were already viewed with suspicion, be they claimants or employees, past or present. Government, in designing and implementing a response to reports of institutional abuse, must appreciate the impact that the media have, and govern itself accordingly. This might mean, for example, that Government should repeatedly and effectively reiterate, in its public utterances, *the presumption of innocence and the importance of avoiding premature judgments about individual employees or claimants.*

XIV

The Memorandum of Agreement for Employees

1. 1994 - 1997

Current and past employees have voiced concerns over how they were treated before, during and after the currency of the Compensation Program. They voiced concerns to the Government and the public as events unfolded, and to me during the course of my review. In this chapter, I describe the history and nature of some of those concerns, as well as how the Government sought to respond to them.

As described earlier in this Report, Government officials did not identify the employees or their union as stakeholders or parties with interests to be considered in the process, either before or during the negotiations with claimants' counsel which culminated in the Memorandum of Understanding ("MOU") and the Compensation Program. Thus, a significant component of the Government's response was undertaken without consultation with employees and without informing them of the contemplated program.

Almost as soon as the Government announced its three-pronged response to reports of institutional abuse, the Nova Scotia Government Employees Union ("NSGEU") sought to become involved. Its president, David Peters, wrote to the Minister of Human Resources, the Honourable Eleanor E. Norrie, asking to be advised of interviews that were going to be conducted with employees, and to have the NSGEU represent the employees throughout the process. He also sought to make submissions with respect to the review being undertaken by Ms. Samuels-Stewart. On December 20, 1994, Peters called for a public inquiry, with its attendant procedural safeguards, to ensure due process for employees.

As noted earlier in my Report, the Internal Investigations Unit ("IIU") was formed in the fall of 1995. In October and November 1995, IIU investigators started issuing notices of allegations to current employees at the Shelburne Youth Centre. By December 6, 1995, 18 employees had been notified of allegations against them and five managers had been served notices of disciplinary default in accordance with the Nova Scotia Management Manual.[162]

As more allegations surfaced, the IIU began to provide some details of the allegations to current employees. For those who faced many allegations, the investigators would give them only information about the most serious allegations. The information provided consisted of the names of the alleged victims, the nature of the conduct alleged, and the time period involved. In some instances, 'can-says' (that is, summaries of what the witnesses could be expected to say) or partial transcripts of claimant interviews were also provided.

Claimants had also named past employees as abusers. The IIU did not follow a consistent pattern respecting the nature and extent of information disclosed to past employees about those allegations. This was at least partly due to the fact that past employees were not facing discipline, but were rather a source of information in ongoing investigations of others. During this time frame, the IIU was only interviewing them in order to corroborate the story of either a claimant or a current employee undergoing a disciplinary investigation. Sometimes past employees did receive 'can-says' or the contents of claimant statements. However, for the most part, past employees were frustrated by the lack of information about the allegations against them and about the details of the Compensation Program.

Both past and current employees made attempts to obtain information through the *Freedom of Information and Protection of Privacy Act* ("FOIPOP").[163] Approximately 30 former employees applied under the Act for information as to the number of allegations against them, what compensation had been paid based upon these allegations, and what allegations had not yet been resolved within the Compensation Program or had been dismissed as fraudulent. Some of the FOIPOP applications were later abandoned. Twenty-three were ultimately denied. One of the applicants whose request was denied appealed the decision and was ultimately successful in part.[164]

On June 27, 1996, NSGEU president David Peters expressed concerns to the Minister of Justice, the Honourable William Gillis, on behalf of current employees named in allegations of abuse. He stated that unsubstantiated allegations were having a significant impact on union members' lives, and reiterated his position that a full public inquiry was the only way to determine what really happened at Nova Scotia institutions. He also raised the issue of the Government providing support services to employees under investigation.

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[162] A notice of disciplinary default is an allegation that the manager failed to report, direct and/or exercise appropriate action for the prevention of mental, physical or sexual abuse suffered by residents.

[163] S.N.S. 1993, c. 5.

[164] *In the Matter of an Appeal pursuant to Section 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5* (June 13, 2001), Halifax S.H. 155707 (N.S.S.C.).

Cameron McKinnon, a Truro lawyer, assisted one employee in December 1995, when she was interviewed by the IIU. The number of employees that he assisted subsequently grew. Ultimately, he was retained by the NSGEU to provide assistance to a variety of employees.

On July 26, 1996, McKinnon wrote to Marion Tyson, a senior Department of Justice ("Justice") solicitor. He stated that it had always been, and remained, his clients' position that they would co-operate with any Justice investigation provided they were given adequate disclosure to defend themselves against allegations made. Under Tyson's supervision, officials within Justice provided some information to employees regarding their files.

By September 4, 1996, Fred Honsberger, Executive Director of Correctional Services, sent the first batch of letters to employees advising them that investigations into certain allegations of abuse had been completed and that no disciplinary action would be taken in relation to the allegations. At least one letter went so far as to state that the employee had been exonerated, as the allegations had been found to have no merit.

On October 2, 1996, Mr. Peters asked the Minister of Justice to provide legal assistance to unionized and management staff who were the subject of abuse allegations – assistance at least equal to that provided to those making the allegations. On November 27, 1996, the NSGEU followed up this request by issuing a press release, in which the union expressed its hope that the Minister would consider the concerns of employees facing false allegations. It called upon the Minister to recognize that employees needed to be protected from false allegations.

2. JANUARY 1997 - JULY 1998

In mid-January 1997, the Deputy Minister of Justice met with Peters to discuss employee concerns. The Deputy Minister agreed to pay for certain legal fees incurred by employees facing internal investigation, but not for services provided in defending criminal charges. The Province began to provide the NSGEU with funds for legal services effective January 10, 1997.

In late February 1997, Mr. McKinnon informed the Deputy Minister that at a meeting on January 15th the employees had expressed concern about how the Government was dealing with disciplinary matters. He asked if the Government was prepared to compensate the employees for the devastation caused by the investigations. On March 3rd, the Deputy Minister responded that "all staff who have allegations against them will be treated fairly during the investigation and disciplinary process as may be required ... [E]ach employee's situation will be assessed on an individual basis and staff will have an opportunity to respond before any disciplinary action is taken."

Also on March 3, 1997, McKinnon wrote again to express concerns about the investigation. In this letter, he expressed doubt that the extent of the abuse was as great as asserted by the claimants:

> For there to have been abuse on the scale alleged one would have to believe, erroneously, in a conspiracy of epic proportion. I am sure you know the system of checks and balances that was inherent in the Shelburne Youth Centre throughout the years ... To put it quite bluntly, any conspiracy at play is as a result of the government offering $33.5 million to anyone who had ever suffered abuse at government institutions. Human nature being what it is it is not surprising that the government grossly underestimated the number of claims presented.
>
> (Emphasis in the original.)

On March 25, 1997, the NSGEU filed a policy grievance. In order to explain the substance of the grievance, it is necessary to quote extensively from it:

> The Union is alleging that the Employer has violated Articles 6, 21, 24, 26 and any other relevant Articles of the PR Collective Agreement and the similar provisions in the MOS, EDC and TE Collective Agreement by the manner in which it has conducted an investigation into complaints of misconduct by members of the bargaining unit employed at these facilities. The Union claims that the affected employees have been aggrieved and treated unjustly by the actions and inactions of the Employer. They have been subjected to discipline without just cause.
>
> The Union says that the Employer has treated the affected employees unfairly and has denied them due process. Some employees have been suspended from their jobs without being given an opportunity to answer the complaints against them. They have been denied access to their personal files and have not been fully informed of the complaints made against them. They have been questioned by investigators acting for the Employer without proper notification in advance to the Union and to the employee affected and without Union representation or legal counsel being present, despite requests that representation and counsel be permitted to attend such interviews.
>
> The Employer has compounded the unjust treatment of some employees by pre-judging the allegations of misconduct against them and awarding compensation to some individuals who have complained against them and awarding compensation to some individuals who have complained they were abused by these employees before allowing the employees an opportunity to respond to the allegations.

> Finally, the Employer has unreasonably prolonged the investigation process, significantly adding to the damage caused by its unjust treatment of these employees.
>
> The Union submits the Employer has breached the Collective Agreement and has been negligent in its treatment of these employees. The employees have suffered damage to their health as a result of the actions and inactions of the Employer. Their professional reputations and their reputations in their communities have been diminished. They have been forced to obtain independent legal counsel in an effort to protect their interests and they have suffered a loss of income and a loss of employment opportunities.
>
> The Union will claim the following in relief:
>
> - A declaration that the Employer has breached the terms of the Collective Agreement;
> - An Order that the Employer withdraw the suspensions of the employees and reinstate them to their positions forthwith;
> - An Order that the Employer publicly announce the exoneration of employees when it determines the complaints made against them have not been substantiated;
> - An Order that the employees be compensated and made whole for the losses they have suffered including:
>
>   a. Full compensation for lost income;
>   b. The payment of legal costs;
>   c. Aggravated damages;
>   d. Punitive damages;
>   e. General damages for pain, suffering, and loss of reputation.

William Lahey, Director of Corporate Services in the Department of Human Resources, responded on April 7, 1997. In his view, the letter submitted by the NSGEU did not constitute a policy grievance: the allegations made were matters for individual grievances. The union responded that the dispute involved the general application or interpretation of the collective agreement, as well as individual matters. It was, therefore, properly a policy grievance.

On May 26, 1997, Mr. Lahey denied the grievance on behalf of the Government. He notified the union that if the matter proceeded to adjudication, the Government would be arguing that the matter should not be dealt with as a policy grievance. The parties corresponded on the issue of choice of arbitrator over the summer and the matter was eventually set down for hearing on January 8, 1998.

On September 24, 1997, the NSGEU issued a press release calling on the Minister of Justice to take action to prevent unfounded allegations from being made and to demonstrate to employees that frivolous allegations would not be tolerated. On November 6, 1997, the day the Government announced further changes to the Compensation Program (outlined in the Compensation for Institutional Abuse Program Guidelines), David Peters wrote to the Minister noting that the Government had still not addressed the concerns of employees, even though it had tightened up the Program somewhat. He again asserted that employees were entitled to compensation for the damages suffered throughout the Government's response to claims of abuse. He also called, once again, for a public inquiry to deal with allegations of abuse and to examine the way the matter was handled by the Government. Soon thereafter, the Deputy Minister and IIU management were subpoenaed to attend the grievance hearing set for January 8, 1998.

By December 1997, the employment status of current Shelburne employees facing allegations varied. Four employees who faced either a significant number of allegations or a serious single allegation were on leave with pay; they were instructed to stay off the Shelburne property. Seven employees were on long-term disability and two were on short-term disability. Two were working within the institution but assigned to other duties; one had been transferred to another department. Nineteen employees were still performing their regular duties. Five retired under the Early Retirement Incentive Program.

During the latter half of 1997, the Department of Justice had considered engaging a human resources consultant to assist current employees facing allegations. In the spring of 1998, it entered into an agreement with TWB Thompson Associates Inc. ("TWB"). TWB was a firm of recruitment and career counselling consultants, owned by Diane Peters. Its role was described by Fred Honsberger in a letter to Peters:

> - To provide personnel assessment and career counselling services for Shelburne Youth Centre employees who have been affected by allegations of abuse.
> - Services will focus primarily on returning to work at the Shelburne Youth Centre or finding new positions that are an appropriate fit with the knowledge, skills and abilities of employees.
> - To ensure the continued productivity and improved morale of employees who have been affected by allegations. To provide necessary supports to enable an effective career transition for these employees.

Fred Honsberger suggested in a memorandum to the Deputy Minister that TWB provided excellent service, but some employees reported to me that they were not always satisfied with the assistance they received. There is no need, however, for me to try to reconcile these competing assertions.

In the meantime, William Lahey and David Peters continued their dialogue over the policy grievance. On December 22, 1997, Lahey suggested that there might be dispute resolution methods other than arbitration that would facilitate the resolution of the grievance. That same day, Lahey advised the Deputy Ministers of Justice and of Community Services that an arbitration would be lengthy and complex, would not benefit employees, and would complicate departmental efforts to re-integrate employees. For these reasons, he recommended that it was advisable to seek resolution of the matters raised in the grievance by other means.

On December 31, 1997, Lahey, Honsberger and Peters met and agreed that arbitration would not be the best way to achieve the desired outcomes. A series of meetings between Lahey and Peters followed. They hoped to resolve the issue and have a Memorandum of Agreement in place by February 15, 1998.

During this period, the demands of former employees for both meetings with the Government and the payment of legal fees intensified. On January 14, 1998, Honsberger suggested to the Deputy Minister that when meeting with former employees, the Department should listen and respond to their concerns where possible. He also suggested that a "communication link be established" whereby the executive of the group of former employees could meet with the Deputy Minister and himself once every two to three months. He thought it would be appropriate to send a formal letter to former employees exonerating them, where applicable, after the investigation was complete.

On February 21, 1998, the Premier, the Honourable Russell MacLellan, met with retired employees in Shelburne. Meetings also occurred, as suggested, between former employees and Honsberger and the Deputy Minister. In early March, the past employees expressed the view that these meetings were productive and there appeared to be a genuine effort on the part of the Government to work towards a satisfactory solution.

On March 4, 1998, the Deputy Minister responded to a communication sent to him by Past Employees Against ADR, the predecessor of Past Employees for Restorative Justice ("PERJ").[165] He stated that the Province would pursue charges for fraudulent claims. He agreed that staff should be given polygraph results. He also advised that where the IIU investigation was complete, letters of exoneration would be provided, as appropriate, though these letters would have no bearing on the RCMP investigation. He said that all requests for information should be made through FOIPOP.

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[165] PERJ is a group that was formed to pursue the concerns of past employees in connection with the Compensation Program.

On April 28, 1998, Honsberger informed Lee Keating, PERJ's President, that the Province could not pay for the legal defence of former employees facing a criminal investigation and/or charges. However, he said the Province would pay for up to four hours of legal advice so that former employees could understand their rights and obligations in criminal matters.

Leahy and Peters continued work on a Memorandum of Agreement. On April 18, 1998, they achieved some success. An Interim Memorandum of Agreement was signed by the NSGEU and the Province. It provided for benefits to current employees facing allegations under investigation by the IIU, without prejudice to the employer, while negotiations between the NSGEU and the Province continued. It covered areas where agreement had previously been reached, including the use of third party professionals such as TWB, and the top-up of long term disability benefits. Issues such as the payment of legal fees and the availability of the Early Retirement Incentive Program and the Early Departure Incentive Program remained unresolved.

Cameron McKinnon requested that the Government also provide assistance for management staff. Lahey advised McKinnon to contact the Deputy Ministers of Justice and Community Services. On May 21, 1998, the Deputy Minister of Justice informed McKinnon that management staff would receive the same consideration as members of the NSGEU, consistent with the Interim Memorandum of Agreement. He stated that special arrangements for management staff would be inappropriate.

3. THE MEMORANDUM OF AGREEMENT

The final Memorandum of Agreement ("MOA") was signed on June 25, 1998. It is reproduced at the end of my Report as Appendix "H". Once it was executed, the NSGEU withdrew its policy grievance.

A serious dispute remains between the NSGEU and some of its membership over the signing of the agreement. Members allege that the final draft was not submitted to them for approval, that it was negotiated behind closed doors, and that it was forced upon them. Recently, a lawsuit was launched against the NSGEU by some of its members, alleging that the union failed to represent the members' interests from the outset of the investigation into abuse allegations.[166] The NSGEU and Peters disagree with this position, and they maintain that the employees were well served in difficult circumstances by the union. This, of course, is a matter for the courts to resolve.

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[166] *John Bingham et al* and *Nova Scotia Government Employees Union* (August 24, 2001), S.Y. No. 443.

The purpose of the MOA was to define the options available to employees against whom allegations of abuse were made within the mandate of the Internal Investigations Unit, but who were not discharged as a result of the IIU investigation. (The Interim Memorandum of Agreement continued to apply while the IIU investigation was ongoing). The MOA also outlined the procedures to be used in applying these options, and how disputes would be resolved.

Several options were available to employees under the MOA. First, an employee could request a placement or transfer into a different position within Government. The Province agreed to provide assistance with retraining and relocation expenses associated with such moves, which were intended to be long-term. Second, an employee could transfer into the private sector . The Province agreed to allow such employees to end their employment in government in accordance with the already established Early Departure Incentive Program. Third, an employee could opt for early retirement. The Province agreed to establish a four-year early retirement program, to run from April 1, 1998 to May 31, 2002.

The MOA also provided several direct financial benefits to employees. The Province agreed to top-up to 100% the pay of employees on short-term or long-term disabilities caused by allegations of abuse. It also agreed to compensate employees for pay lost by them while on long-term disability before the Interim MOA came into force, as well as during the period "between the exhaustion of short-term and long-term disability benefits." The Province further agreed to reimburse employees for legitimate expenses reasonably incurred as a direct consequence of being accused of and investigated for abuse. An employee did not have to be charged with a criminal offence to obtain such reimbursement, but employees who were acquitted of criminal offences could obtain reimbursement for legal expenses incurred in their defence, providing they were not disciplined by the Province for conduct on which the charges were based.[167]

Any employee who was cleared by the IIU investigation was entitled to a written exoneration from the Province. The MOA stipulated that such exonerations were based on non-criminal investigations for the purpose of making employment-related decisions, and had no application to the criminal process.

Disputes concerning the application of the MOA to a particular employee were to be determined by a career development/job placement professional. Disputes as to the interpretation of the MOA were to be decided by one of three designated chairpersons.

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[167] An employee could be acquitted of charges, yet disciplined for the underlying conduct because of the different standards of proof applicable to the criminal and disciplinary proceedings.

4. IMPLEMENTATION OF THE MEMORANDUM OF AGREEMENT

In order to implement the MOA, a working committee was established by the Government on July 3, 1998. Members of the committee included representatives from the Departments of Human Resources, Justice, and Community Services. They were responsible for considering the situations of individual employees and administering the MOA.

Employees continued to be concerned with their treatment at the hands of Government officials despite the existence of the MOA. On November 25, 1998, the current employees asked that Linda Chisholm from the Ombudsman's Office be appointed to address their concerns. At a meeting on December 14, 1998, a group of current employees expressed the view that the MOA had broken down. Among other things, they complained that the Department of Justice was controlling the working committee, and that some employees had only been given two-year positions outside of Shelburne, with no guarantee of longer-term employment.

In April 1999, Honsberger arranged for an Employee Assistance Program ("EAP") officer to meet with PERJ to better understand the past employees' need for assistance. EAP was a program through which the Government offered professional counselling services to its employees. On September 15, 1999, the Deputy Ministers of Justice and Community Services asked that such a program be put in place for employees who were being interviewed by the RCMP.

As of January 2002, 52 employees had sought some sort of assistance under the MOA.

5. ANALYSIS

As indicated above, current and former employees complained on many occasions that their rights were disregarded by the response chosen and implemented by the Government. They have referred in their representations to the principles of the Magna Carta, *procedural fairness, due process, and the* Canadian Charter of Rights and Freedoms. *They complained, in particular, about the negotiations, without their input, leading up to the Memorandum of Understanding, and their inability to obtain information from the Government about how many claims were outstanding against individual employees, how many were settled and for how much. Above all, they have submitted that the Compensation Program paid claimants for alleged abuse without providing the employees with a forum to refute those allegations. This, in turn, gave claimants a powerful motive to fabricate and exaggerate. Since the veracity of abuse allegations was presumed, not only were* *the Government and the public losers in the process, but the reputations and emotional well-being of former and current employees were irreparably damaged.*

The impact of the process upon employees (and claimants) was earlier described. One aspect of that impact for current employees was the effect of allegations upon their ability to work either at their institutions or elsewhere. Some were disabled and rendered unable to work. Others were moved out of their institutions while awaiting the investigation of the allegations made against them. Yet another complaint registered against the Government by employees is that their employment status was dealt with by Government in inconsistent, sometimes arbitrary, ways. Some employees were sent home, while others similarly situated were permitted to remain at work. This meant to the outside world that some had already been adjudged to be guilty.

The Supreme Court of Canada said the following in 1997 in Reference Re: Public Service Employee Relations Act (Alta.):[168]

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*

The Court spoke again, two years later, in Slaight Communications *v.* Davidson:[169]

> *[E]mployment is seen as providing recognition of the individual being engaged in something worthwhile ... [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.*

The case law clearly indicates a duty on employers to act fairly to their employees. While no current employee was dismissed as the result of allegations made by claimants, it is not out of place to quote from a wrongful dismissal case decided in 1984:[170]

> *It is difficult to conceive of an accusation more calculated to cause humiliation and anguish to a dedicated bank employee than that of theft of the bank's funds. Moreover, the manner*

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[168] [1987] 1 S.C.R. 313 at 368, *per* Dickson C.J.C.

[169] [1989] 1 S.C.R. 1038 at *per* Dickson C.J.C., citing Beatty, "Labour is not a Commodity" in Reiter and Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) at 323-324.

[170] *Rahemtulla* v. *Vanfed Credit Union*, [1984] B.C.J. No. 2790 (B.C.S.C.), *per* McLachlin J. (as she then was), at paras. 34-35.

> *in which the plaintiff was dismissed was arbitrary and humiliating. Before her co-workers and family, at the beginning of what she hoped would be her career, she found herself branded as a thief. Not only were the circumstances of the plaintiff's termination of employment abrupt, harsh and humiliating, but that humiliation continued up to the time of trial.*
>
> .....
>
> *In these circumstances it is not surprising that the plaintiff suffered severe mental distress. Her initial reaction was one of shock and despair. For a period in excess of a month she suffered severe depression, such that she was unable to leave the house or engage in any of her normal pursuits. She felt life was not worth living. She suffered from sleeplessness and she stopped eating. She had blackouts and headaches. On several occasions medical attendants were called to the home and she was twice briefly hospitalized. While other problems such as the tumour she discovered in her chest may well have contributed to her distress, I am satisfied that the most significant cause of her depression and continuing unhappiness has been the treatment she has received at the hands of the defendant and the effect that has had upon her prospect for employment.*

These cases reinforce the duty of employers to act fairly to their employees, and the terrible anguish, humiliation, physical and mental distress suffered by employees against whom false allegations of criminality have been made. My mandate neither requires nor permits me to determine whether the legal rights of employees were violated to the point where the Government is liable to them for damages. What I am able to say is that the Government's response to reports of institutional abuse, most particularly the Compensation Program and its lack of a credible validation process, was unfair to employees. The fact that the settlements or awards were purportedly confidential and that the Government made no admissions of liability did not, in the context of the Nova Scotia situation, prevent individual employees and employees collectively from being prejudiced.

Further, the way in which the Government addressed the employment status of suspected abusers was also deeply problematic in at least two ways. First, as earlier indicated, similarly situated employees were sometimes dealt with inconsistently and arbitrarily. Second, the Government adopted a response that caused some employees to be kept 'in limbo' for years, to a point that some could never be reintegrated into the work environment, even if ultimately exonerated.

I have found that the Government's response was, at times, inappropriate, unreasonable and unfair to employees. Having said that, to its credit, the Government did recognize that measures had to be taken to address the impact of the process upon its employees. The interim and final Memoranda of Agreement represented well intentioned efforts on the part of the Government to *ameliorate that impact. Given the pending litigation between some employees and the NSGEU, it would be unwise for me to decide whether the NSGEU should or should not have entered into the Memorandum of Agreement. For the purposes of my Report, I can only say that no Memorandum of Agreement would have been necessary had the Government's response been better designed and given greater prominence to the interests of its employees.*

XV

The IIU Report

1. INTRODUCTION

In December 1999, the Internal Investigations Unit ("IIU") provided a Report to the Minister of Justice "regarding the investigation into allegations of abuse by former residents of Provincial youth facilities." The Report outlined the IIU's conclusions about the veracity and verifiability of the many claims of abuse levelled against both past and present employees of the Shelburne Youth Centre ("SYC"), the Nova Scotia Residential Centre ("NSRC") and the Nova Scotia Youth Training Centre ("NSYTC").[171] It was largely written by Frank Chambers, the IIU's Director at the time, and David Baker, a former file assessor with the Compensation Program, and it is therefore sometimes referred to as the "Chambers - Baker Report."

The IIU's basic conclusion is stated in an early chapter of the Report:

> To the best of our information and belief, neither credible nor reliable evidence exists to corroborate or substantiate the vast extent and severity of allegations made by adult complainants who were residents of institutions for the detention of juvenile delinquents/young offenders and other children, at about the time of the operation of the *Compensation Program* in about 1994-1999. The more that these allegations (including those made through the Stratton investigation) are strictly scrutinized according to the discovery of relevant information, the more that reasonable doubts are raised about their legitimacy. When assessed against the background of objective, confirmable information, most of the allegations are either unsustainable or implausible.

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[171] As noted elsewhere, the names of two of these institutions changed over time. The Shelburne Youth Centre was previously called the Nova Scotia School for Boys. The Nova Scotia Residential Centre was previously called the Nova Scotia School for Girls. For ease of reference, only the most recent names of the institutions are used here.

The 529-page Report was initially provided to the Government. An edited version was subsequently released to the public. Although the edited version is summarized here, I have had access to the complete report, as well as the 23 volumes of appendices.

2. BACKGROUND AND MATERIALS REVIEWED

The Report was based on interviews of numerous individuals and a review of between 1,500,000 and 2,000,000 documents. Much of this documentary information was not available to the Stratton investigation.

The Report lists and summarizes in some detail the types of materials reviewed by the investigators. An abridged list is given here:

- Statements made by individuals claiming to have been the victims of abuse, many of whom were claimants under the Government's Compensation Program ("claimants," sometimes referred to as "complainants" in the Report);

- A handful of statements from former residents of the institutions under review who were not claiming to have been abused during their residency;

- Statements from current and former employees of the institutions under review;

- Findings of RCMP and other police investigations with respect to abuse allegations brought to their attention (a reference to investigations that predated Operation Hope);

- Personal information regarding many claimants, including medical, educational, counselling, employment, child welfare, and social services records, and file materials held by correctional authorities;

- Incident reports prepared pursuant to the policies of the institutions under review, documenting incidents involving residents, including those where physical force was used;

- Ordinary business records from the institutions, including daily logs, shift and medical reports, and infirmary records;
- Institutional yearbooks;
- Memoranda, minutes of staff meetings, and other documents, describing the environment of the institutions and the history and evolution of their programs and policies;
- Documents, policies and procedures relating to discipline and the use of force by institutional staff;
- Information regarding certain notable events which occurred at the two institutions and which (according to the IIU) would likely be long remembered by residents and staff alike;
- Correspondence from Department of Social Services files relating to incidents and activities at SYC;
- Governmental and non-Governmental reports on the institutions prepared from 1959 to 1993.

The IIU asserted in the Report that it had reviewed and assessed a sufficient quantity of material to safely draw its conclusions and deductions. However, it acknowledged that there was much additional relevant information that it did not review, either because of insufficient time or because the information was no longer available.

3. FINDINGS

As noted above, the IIU was very sceptical of the great majority of the allegations of abuse. It argued that they were unconfirmable, incredible and implausible. It did not deny that a limited number of incidents of child abuse had likely occurred, but it contended that such abuse was aberrational or sporadic, not systemic. Further, it claimed that reports of the incidents seemed to have been embellished over time.

The IIU offered several reasons for its conclusions. They are summarized below.

(a) Context of the Compensation Program

The IIU argued in the Report that the allegations of abuse by current and former employees of SYC, NSRC and NSYTC had to be assessed within the context in which they arose. Most of the allegations were made in the "highly extraordinary environment and context" of the Compensation Program. In other words, they were only made after a promise of financial compensation was offered or reasonably foreseeable.

The Report outlined the historical background to the claims of abuse. The story began with the conviction in 1993 of Patrick MacDougall, a former employee of SYC, on a series of sexual offences against former residents of the centre. A number of civil actions against the Province followed, with the plaintiffs claiming that they had been assaulted by counsellors at SYC or NSRC or by Cesar Lalo, a probation officer who had been convicted of certain sexual offences in 1994. At the same time, the subject of institutional abuse in various parts of Canada was receiving a lot of media attention, and a number of compensation programs had already been or were then in operation across the country.

As stated elsewhere, the Government of Nova Scotia announced its three-pronged response to allegations of institutional abuse on November 2, 1994. One part of the response was a commitment to provide fair compensation to the victims. In July 1995, the Government announced that it would enter into an alternative dispute resolution process in which $10,000,000 would be set aside for compensation. In May 1996, the final Compensation Program was announced with a total budget of $33,500,000. As described in Chapter VII, the Program awarded greater financial compensation to those who suffered more serious and more frequent abuse.

The IIU noted that in November 1995, about 25 claimants were making allegations against nine former staff members of SYC. The allegations pertained to physical, not sexual, abuse. By December 18, 1996, the number of claimants under the Compensation Program was 1,457. The extent and magnitude of the allegations had expanded considerably.

The IIU suggested it was likely that claimants were actively recruited by some of the lawyers negotiating with the Province over the creation of the Compensation Program. It further suggested that once the Program was in place, former residents may have been influenced into giving statements by the schedule of awards, with its description of the various categories of abuse and compensation. The Report suggested that this schedule was likely to have been provided to the former residents by their counsel.

The IIU also contended that the claimants under the Compensation Program were not exposed to serious scrutiny. The clear thrust of the Report was that serious scrutiny would have deterred false claims. Claimants were not subjected to adversarial cross-examination or a duty to disclose relevant information to the Province. Indeed, many claimants were not subjected to any questioning at all. Their statements were made under a promise of secrecy and confidentiality, and past and present employees had no opportunity to confront their accusers and defend themselves. Further, complaints were made in a context where there was a fair degree of public and official consensus that widespread abuse had occurred, likely because of some "fairly inflamed and prejudicial media reaction and coverage of the Stratton Report and related issues." The IIU suggested that this climate of pressure and intimidation appeared to have led to the creation of the ADR program.

The IIU concluded from all this that claimants may have had strong motivation and incentive to fabricate or exaggerate allegations in order to receive monetary compensation. It stated that "basically all of the allegations made in connection to alleged abuses in provincial residential institutions, over the course of the last few years, may have ostensibly been made in anticipation of or for the purposes of receiving compensation from the provincial Crown." It accordingly counselled caution in assessing the allegations, and emphasized the need for confirmation of their truth (confirmation which the IIU could not usually locate).

(b) Absence of Contemporaneous Complaints

The IIU placed great emphasis on the absence of contemporaneous complaints about the abuse. That this important piece of corroborative evidence was missing was a fact which further raised suspicions that the complaints were fraudulent and made for the purpose of receiving compensation.

The IIU concluded that in the great majority of cases no evidence of a contemporaneous complaint about the abuse could be found. Further, where such evidence did exist, it disclosed instances of fairly minor physical or sexual abuse. According to the IIU, "[t]his body of information does not substantiate the severity and extent of the allegations made recently." The IIU acknowledged, however, that in most cases it could not find evidence to either dispute or support the allegations.

The IIU also examined information on some of the claimants found in such documents as correctional files, pre-sentence reports, and psychological assessments. No indication was found in documentation prior to 1994-1995 of the individuals in question having been victims of abuse by employees of the institutions in question, even though there was frequently evidence of complaints about childhood abuse at the hands of parents and foster parents.

The IIU reviewed records of a large number of incidents where residents had run away from the centres. They were often apprehended and returned to the institutions by agencies such as municipal police forces and the RCMP. Not a single piece of evidence was located that a runaway made a contemporaneous complaint of having been mistreated at the institution from which he or she had fled.

Over the years, a number of reports were prepared reviewing various aspects of life at SYC and NSRC.[172] These included both official Government-sponsored reports, as well as media reports by various journalists. In several of the reports, residents were asked whether they had any complaints, or were at least given the opportunity to disclose complaints. Some complaints were made, but none related to physical or sexual abuse. For example, in 1971, a reporter with a local newspaper interviewed residents at SYC without any counsellors present. She specifically asked the residents if counsellors had ever hurt them. The only reported response was from one boy, who said: "If a counsellor cuffs a kid, it's usually because he had it coming." Another reporter, in 1979, stated that the biggest complaints he heard were about homesickness and restrictions on smoking. A 1993 report on female young offenders by the Department of Community Services noted no concerns or suspicions about abuse of residents by staff. To the question "Describe staff at Shelburne," 35 residents said they were helpful and only two said they were hurtful.[173]

The IIU stated that in negotiating claims for compensation, the Province was "beset" by arguments that memories of the abuse had been repressed until the announcement of compensation. In response, the IIU commented that the theory of repressed traumatic memory syndrome was highly controversial. It also argued as follows: "Where an intervening explanation, such as opportunity to receive monetary compensation, is part of the context of disclosure, the immediate application of the theory must be queried: is it plausible that nearly 1,500 claimants remembered being abused in 1994-1999 without any evidence of prior disclosure or complaint?"

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[172] Very little reference is made in the Reports to NSYTC.

[173] Nine said they were too strict and six said they were too lax.

The IIU considered whether residents had had reason to believe that complaints would have been taken seriously, and not just ignored or covered up. It found that they had. Evidence indicated that complaints from residents were investigated and documented, leading in some cases to a variety of disciplinary actions against staff. For example, the IIU uncovered correspondence concerning a 1961 complaint of indecent assault at NSYTC which showed that efforts were made to terminate the employment of the alleged perpetrator (although the then Minister of Highways was trying to intervene on the employee's behalf). Another document reflected that a 1966 complaint of sexual abuse at SYC was "thoroughly investigated" by the Superintendent of the school and the Supervisor of Corrections, but insufficient evidence was uncovered to substantiate the claim. A 1980 investigation of the staff response to misbehaviour by two residents at SYC led to a finding that one staff member had assaulted one of the boys. A 1983 complaint of assault at SYC was investigated by the RCMP and led to an initiative within the Department of Social Services to revise institutional policy on the use of force. Finally, one former employee of SYC told the IIU that many complaints were referred to the RCMP for investigation.

The IIU also noted that SYC had a restrictive policy regarding the use of force by staff, and that residents were aware of it. A formal, comprehensive policy on the use of force was adopted at SYC in 1980. It was subsequently modified and reissued in 1984 and 1987. The policy stated generally that the use of physical force against a resident was strictly prohibited except in cases of self-defence and protection of residents. A 1994 SYC policy on child abuse investigation procedure reflected that residents were to be apprised of the limits on the acceptable use of force by staff and their right to file a complaint if they felt they had suffered abuse. The IIU contended that residents would likely have made complaints if they felt their rights were, or the use of force policy was, being violated.

The IIU found no evidence that staff members and other individuals conspired to cover up alleged incidents of abusive conduct by staff. As noted above, there was evidence that incidents were noticed and investigated. Further, there was evidence that staff members were prepared to complain about each other. For example, a 1979 letter by an administrator at Family and Children's Services reflected that he had received a complaint (seemingly from an employee) that staff at SYC were abusing the residents; the administrator agreed to look into the matter. The IIU found that staff were prepared to complain about the conduct of other staff even on "fairly insignificant" matters.

The IIU also pointed out that residents would have had numerous opportunities to complain to individuals who were not employed at the institutions, yet in a great majority of cases no reliable supporting or corroborating evidence from any third party could be found. A review of institutional profiles and daily logs at SYC indicated that it was common for members of the public to visit the institution, including physicians, social workers, clergy, lawyers, police officers, students and residents' family members. Furthermore, SYC profiles and policies reflected that residents also had contact with the outside world when they were allowed to leave the institution for activities like community service, educational field trips, and family visitations. The documentary evidence for NSRC was not as extensive, but the IIU interviewed various former employees and felt justified in stating that the institution "would have been open and accessible to the public and that residents had various points of contact with the local community of Truro."

The IIU summed up its view as to the significance of all this evidence as follows:

> All things considered, whether or not contemporaneous complaints are made – in a context independent of a possible monetary incentive to report or fabricate accounts of abuse – should be viewed as *a* critical factor in the assessment of the *prima facie* legitimacy of complaints. We are not suggesting that it should be a *determinative* consideration, because clearly there has to be an allowance for instances where contemporaneous disclosure may not have been forthcoming. However, given all the other factors reviewed (for example, that, in the vast majority of cases, there is no evidence of complaints being made until about 1994, when compensation is offered), the lack of any prior disclosure about institutional abuse in reference to the vast majority of complainants and allegations cannot be easily ignored. (Emphasis in the original.)

(c) Problems with the Statements of Claimants

The IIU examined the statements given by claimants to the Stratton investigation team, the RCMP, the Validation Investigation Unit, and the IIU itself. It concluded that this evidence was the most unreliable and untrustworthy of all the evidence reviewed. The statements were "contradictory and rife with inconsistencies and improbabilities." Some were internally inconsistent, and others were inconsistent on non-peripheral matters, such as the identity or names of the perpetrators or the nature of the alleged abuse. For example, several individuals made allegations against a particular employee at SYC even though they were never resident at the institution when the employee worked there.[174] The IIU also found that most taped statements raised questions about lack of detail and context, vagueness, lack of forthrightness, demeanour and appearance.

The IIU expressed added concern about statements which had been taken by Facts Probe Inc. (the Murphys), the company retained to conduct interviews for the Stratton investigation. The IIU contended that these statements were not 'pure version' statements, but rather statements "prepared, written and edited by Facts Probe Inc. There is a possibility that these statements were prompted by Facts Probe Inc. questions and information supplied by investigators."

(d) The Stratton Findings

The Report addressed the fact that Mr. Stratton had identified 89 individuals as having suffered abuse. The IIU said it had strong reason to believe Mr. Stratton's Report was based on statements which were fabricated or exaggerated, having been influenced by the promise of financial reward.

In support, the IIU referred to the fact that prior to the appointment of Mr. Stratton, the Province had announced that compensation would be paid in the event that liability was found. This would have provided an incentive to former residents to provide misleading statements to the investigation.

The IIU offered other reasons for its conclusion. There were the weaknesses mentioned above in how statements were taken by Facts Probe. Statements were taken in confidence, and claimants were neither sworn nor cross-examined. Most of the claimants had extensive criminal backgrounds, many with convictions bearing upon their credibility. Many claimants were related by family. A number appeared to be psychologically disturbed.

(e) Collusion

The IIU contended there was a strong possibility that many claimants had colluded or collaborated in the giving of false statements in order to receive compensation. This undermined the reliability of the allegations taken as a whole, and raised the issue of whether the evidence was essentially contaminated.

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[174] Many other former residents had also made complaints about the same employee, leading to a concern about collusion.

The IIU suggested that the best evidence of collusion lay in the statements of claimants who made allegations against employees at SYC when records indicated either that the claimants never attended the institution or that the named employees did not work at the institution when the claimants did attend there. Further evidence included the fact that many statements alleged, against the very same employees, incidents which were very similar (but not identical). The opportunity for collusion was also "virtually unlimited," given that statements were taken over a five-year period and many claimants shared the same legal counsel.

The IIU's essential reasoning on this issue is contained in the following paragraph from the report:

> It is indeed reasonable to postulate that where a strong monetary incentive exists, information would be quickly transmitted among former residents of the ... SYC and of the other institutions in question (who may be related by family connection, are incarcerated together, come from the same neighbourhoods or geographical areas, or are associated in criminal circles, or any combination thereof) to the effect that if certain employees or former employees are identified in statements to receive compensation, then this will yield a compensatory award. Over the course of the past four years, these claims were gradually legitimized through the payment of compensation that may have spawned similar claims. This whole matter is reduced to simple economic opportunity, without much risk of negative consequences. Indeed, the number and extent of allegations by former residents can probably best be explained through basic neoclassical economic analysis. People respond to incentives, which depend on the relationship between expected benefits and marginal opportunity cost. In this case, it appears that expected marginal benefits involved in the filing of a false statement would have far outweighed any opportunity costs. For many persons who chose to file a claim, it was probably too good of an opportunity to pass up.

(f) Absence of Supporting Medical Evidence

The Report highlighted the absence of supporting medical evidence. The IIU suggested that many of the alleged assaults would have resulted in injuries requiring medical attention and treatment, and this treatment would have been chronicled in records of the institutional infirmaries or local hospitals. The IIU reviewed many such records, yet found almost no corroboration of the alleged assaults. Many residents were given treatment over the years, but usually for reasons apparently unconnected to allegations of abuse: "regular medical checkups, blood tests and a number of out-patient referrals for any number of possible injuries that any youth might encounter" (from such things as sports, accidents and fights with other residents).

The medical records often indicated a reason for or cause of the injury being treated. With few exceptions, the explanations did not support or corroborate allegations of abuse by institutional staff, that is to say, allegations of assault causing bodily harm. The IIU did discover a handful of documented instances where residents received medical treatment after a contemporaneously made complaint of abuse, but these instances were relatively few compared to the large number of complaints made in connection with the Compensation Program. Furthermore, doctors and nurses interviewed by the IIU were unaware of complaints or evidence of institutional abuse. The IIU felt that trained medical personnel would have been able to recognize signs of child abuse, regardless of any explanation proffered by the patient. It uncovered no evidence of a conspiracy by medical staff at local hospitals to conceal such evidence.

(g) The Institutional Environment

The IIU reviewed several reports prepared over the years to assess certain aspects of the programs at SYC and NSRC. These reports dated from 1962 to 1993. They were prepared for various provincial Government departments, sometimes by Government employees, at other times by outside experts. None made mention of abuse by staff, even though the authors of the reports had often toured the institutions and spoken to both staff and residents. The IIU further noted that some of the reports were quite comprehensive and fairly critical on the whole.

The IIU placed significant weight on evidence that SYC and NSRC were relatively open institutions where the issue of using force against residents was frequently addressed. This evidence was considered not only proof that residents had both a reason and the opportunity to make contemporaneous complaints of abuse, but also as an independent factor undermining the suggestion that the institutions were rife with abuse and unconcerned with the welfare of the residents. The IIU concluded that "most allegations, in whole or in part, made since about 1993, cannot be reconciled with information we have discovered about the institutional environment and culture" at SYC and NSRC.

The IIU located various documents (institutional profiles, memoranda and handwritten notes) which outlined the correctional and pedagogical philosophy at SYC. In brief, these documents indicated that residents were offered a wide variety of educational and recreational opportunities, and that thought was given to the residents' mental, physical, and spiritual well-being. For example, a 1980 profile of SYC reflected that, *inter alia*, the academic program is tailored as much as possible to the special needs of the residents, recreational activities such as dancing, swimming and curling are offered, dental and eye care needs are addressed, psychological and psychiatric services are available, and staff are expected to "reach out to youngsters in their care" and "take advantage of every opportunity to be helpful to [a] boy's growth and development."

The IIU also traced the development of policies at SYC on the use of force against residents. It located a number of documents (position papers, policies and minutes of staff meetings), dating back as early as 1970, in which the issue is discussed and debated. On the whole, the documents reflected concern over the application of force, and a desire to set limits on its use. The discussion culminated in the adoption of a formal use of force policy in 1980, in which force against residents was prohibited except in self-defence or protection of residents. The IIU concluded that from about 1960 onwards there appeared to have been a concerted effort to eliminate the use of force at SYC. The documentary evidence for NSRC was more sparse, but various minutes of regular staff meetings reflected discussion of appropriate behaviour by staff and the proper use of physical force.

(h) Contradictory Evidence

Over and above evidence which was incompatible with the allegations of abuse, the IIU also pointed to evidence which was directly inconsistent with the abuse having occurred. This evidence came in several forms.

There was evidence that a number of former residents saw their time at the institutions as a positive experience. A study by the Department of Social Services interviewed 39 women who were released from NSRC between 1967 and 1972. Most felt that their time at the centre was of benefit to them. Thirty-two felt they were treated fairly, while six felt they were treated unfairly, either by the staff or because they were committed to the centre in the first place. A 1993 study of female residents at SYC found that most thought the staff was helpful to them. In general, the IIU stated that it located a substantial amount of material showing residents actually liked being at SYC and other residential institutions, with some expressing a desire to remain there or (after release) to return there.

The IIU noted that a large number of past and present employees had submitted to polygraph examinations, the results of which were exculpatory in the great majority of cases. On the other hand, all claimants who were offered the chance to submit to a polygraph examination under the Compensation Program either declined the opportunity or failed the test. The IIU defended the polygraph as a valuable investigative tool, which is frequently used in police investigations. It also pointed out that the Province had accepted polygraph results as legitimate and credible evidence in the context of the Compensation Program and disciplinary decisions.

Finally, the IIU interviewed a handful of former residents of SYC and NSRC who were listed by claimants as witnesses to the alleged assaults. A number of these individuals denied witnessing any abuse, or ever experiencing any themselves. In a similar vein, the IIU pointed to the case of a complaint made in 1971 by a resident of SYC. The boy had been treated at a hospital for a dislodged metal plate in his head, and had claimed there were beatings and brawls involving residents and counsellors at the institution. The complaint attracted media attention, and a local journalist wrote an article about the case. It reflected that SYC staff members and residents indicated no counsellors harmed or attempted to harm the complainant.

4. THE REPORT'S CONCLUSION

The IIU drew the following conclusions from all of the above:

> Most of the allegations made by former residents against employees are unsubstantiated, uncorroborated and counterfactual. Available evidence, including evidence which in our view demonstrates the likely institutional environment, does not support the vast number of allegations brought forward.
>
> On a balance of probabilities, there is neither credible nor reliable evidence, in the form of either witnesses or real/documentary evidence, that corroborates or substantiates the bulk of the allegations made by former residents over the last few years. As regards the great majority of the allegations, we have discovered no reliable corroborative evidence. When we consider here the absence of corroborative evidence, we mean that there is no credible evidence or information, independent of most of the allegations, which significantly supports the veracity of the allegations. We conclude that the bulk of the allegations are therefore unsustained and have likely been fabricated from a motivation to receive compensation.
>
> We conclude on the basis of the materials reviewed that there is some evidence of minor physical abuses and of limited sexual abuse and sexual interference. However, the occurrence of these incidents appears to be relatively aberrational, and do not support a finding of widespread or systemic abuse at institutions including the NSSB/SYC, NSSG/NSRC and NSYTC.

5. ANALYSIS

The IIU Report has generated, like the Compensation Program itself, a great deal of controversy. Current and past employees find in the Report confirmation of what they have said all along about the Program and about the merits of the vast majority of abuse allegations made. They regard the Report as vindication. They indict the Government for ignoring the evidence cited in the Report and continuing on with the Program when its own internal investigators recognized how fundamentally flawed it was during its currency.

On the other hand, claimants' counsel regard the Report as seriously flawed. In their view, the Report relies upon stereotypical notions of how abuse victims should be expected to act, contains a myriad of factual mistakes about the presence or absence of corroborative evidence, places reliance upon unreliable polygraph test results and, in general, represents a biased evaluation, driven by investigators who became too close to the employees they were investigating and who, ultimately, became advocates for the employees' cause. Claimants' counsel note that the Report's co-author, David Baker, was a file assessor who demonstrated antipathy to the Program that should have disqualified him from objectively evaluating it.

Finally, claimants' counsel rely upon Madam Justice Heather Robertson's evaluation of the IIU Report in R. v. Lalo,[175] *where she was invited to stay the criminal charges against Cesar Lalo on the basis that continuation of the prosecution would amount to an abuse of the court's process or an infringement of the* Charter. *In dismissing the application, Robertson J. said, in part:*

> *The Chambers Report cannot be relied upon as proof of false allegations of abuse at Shelburne, or collusion respecting claims made to the ADR programme. In my view it was an employee centred inquiry that favoured the word of those accused of abuse over the word of the former residents. It assumed that many of these residents, most of whom are now adults, had formed criminal associations and were thus likely to collude to take advantage of the compensation scheme. The report is a smoking gun and a condemnation of the compensation programme that appears to have been seriously flawed, in its delivery.*

Some Government officials also take issue both with the accuracy of the Report and, indeed, with the fact that it was even written. Some expressed the view that the Report represents a piece of advocacy that was not sought by the Government and which does not truly fall within the IIU's mandate.

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[175] Released February 16, 2001. This decision, dismissing an application for a stay of the proceedings, is the subject of a publication ban to protect the identities of the complainants. I have, of course, respected the ban.

Resolution of this debate – while no doubt of importance to the participants – does not advance the systemic focus of my review and, in any event, would require me to make findings which I am unable in law to make. Although there are 'process' issues associated with how and by whom this Report came to be written, the real debate is over its accuracy. Although it might be frustrating to some, I reiterate yet again that I am not in a position to determine the merits of individual claims of abuse or the prevalence of abuse generally. Nor do I regard Madam Justice Robertson's comments – which in my respectful view were unnecessary to her decision – as controlling.

That being said, I do, however, have some comments on the Report.

At times, undue emphasis is placed upon the failure to contemporaneously complain about abuse, given the institutional setting in which abuse allegedly occurred. The Report may be read as raising questions as to the guilt of MacDougall on some of the charges to which he pleaded guilty, a view I do not share. The Report, while appropriately raising concern about the possibility of collusion and about how providing the chart of compensable abuse to former residents could produce exaggerated claims, is careless about ascribing improper motives to some claimants' counsel. The evidence disclosed in the IIU Report did not support their conclusions in this regard.

My staff and I have reviewed much of the documentation referred to in the IIU Report and conducted many interviews. There is significant evidence, direct and circumstantial, that false and exaggerated claims were made to the Government, and that these claims were motivated by monetary awards being offered by the Program and the known absence of a true validation process. There is significant evidence that some individuals colluded in making false claims. Indeed, some individuals have admitted that they participated in making false claims or that they are aware of false or exaggerated claims made by others.

In one statement I have read, the witness, incarcerated at Dorchester Penitentiary in New Brunswick, described how he assisted a fellow inmate to write a letter of complaint. Although the fellow inmate had described some abuse, the witness included details of abuse he had heard from the victims of Karl Toft (the main perpetrator at Kingsclear, New Brunswick). He described the letter as "just a scam to get big money." The fellow inmate had confirmed that this was the kind of letter he wanted, "as it covered a multitude of abuses and would get the top compensation amount." The witness was to get 10% of the compensation awarded.

Another witness, whose lengthy statement to the IIU I reviewed, stated that, although he had undergone some physical abuse, his allegations of sexual abuse against four employees, for which *he was compensated, were false. One wasn't even in his unit; he didn't think another was there when the witness was. He got the names from other inmates within the correctional centre. He also admitted that he had exaggerated claims of physical abuse. He described the free flow of information between inmates, including himself, concerning their allegations of abuse, the names of counsellors and how they could get money from the Program. Inmates read other inmates' statements and provided input. Others acknowledged that they had made false claims as well.*

The IIU also assembled materials that attempted to correlate inmates who had made claims, when those claims were made, what those claims alleged and what, if any, connection there was between the inmates prior to their incarceration together. In the least, these materials demonstrated that the opportunity for collusion by a number of inmates was substantial.

Finally, I note here that there also appears to be significant evidence that some contemporaneous complaints made by residents, or statements previously provided to the RCMP and others, are incompatible with claims later advanced by the same individuals within the Compensation Program. Although I recognize – as I have noted elsewhere – that it would constitute stereotypical thinking to conclude that the absence of any contemporaneous complaint compels the conclusion that no abuse occurred, the discrepancies noted here, in the least, invite close scrutiny and, in some cases, scepticism, about some of the claims now advanced.

There remain very different perspectives on the extent to which abuse claims made to the Compensation Program are true of false. The IIU Report represents one of those perspectives. I am convinced that, with limited exceptions (for instance, where admissions had been made, criminal convictions have been registered or where reliable, corroborative evidence exists), it is now extremely difficult, if not impossible, to reconstruct what abuse did or did not occur within the institutions. In part, this is a function of the passage of time and the unavailability of some witnesses. But of most importance to my Report, it also reflects the shortcomings of a Government response that failed to appropriately consider and address the interplay between the Compensation Program and the criminal process. Our inability now to effectively sort out true and false claims of abuse does a disservice both to true victims of abuse and innocent employees.

XVI

Events Outside Nova Scotia

1. INTRODUCTION

In the previous chapters, I summarized the deficiencies or problems associated with the Nova Scotia response to reports of institutional abuse. The more challenging task is to make recommendations as to how such reports should be addressed by government in the future. Elsewhere, I described such recommendations as a 'blueprint for the future.'

What is obvious is that there is a serious need to consider the future of government responses to reports of institutional abuse. The Nova Scotia response represents only one in a series of government programs that have met with varying degrees of success. There is no reason to believe that allegations of institutional abuse elsewhere in Nova Scotia or, indeed, Canada will end here. On the contrary, there are indications that such allegations are continuing to surface.

Having said that, one must recognize that there are significant variables that prevent a government from simply superimposing one program – however successful – upon a different factual situation. These variables include, but are not limited to:

- the kind of abuse alleged;
- how the alleged abuse came to light;
- whether current employees are implicated;
- the size of the pool of potential claimants;

- the extent to which allegations of abuse have already been tested in criminal or other judicial proceedings;
- the existence of parallel investigations;
- how recent the alleged abuse is;
- the nature of the institutions involved and their residents;
- the gender, colour, and cultural or ethnic background of those alleging abuse;
- their psychological backgrounds;
- whether such individuals are mentally or physically challenged;
- the existence of factors affecting their access to legal services; and
- the availability of government resources.

The approach, therefore, is to identify those considerations that properly underlie a government response, and to examine the components of both successful as well as unsuccessful approaches to the issues. In that regard, I examine the responses made to reports of institutional abuse in other Canadian jurisdictions, as well as a study of the topic prepared by the Law Commission of Canada. The responses of other jurisdictions are considered here. The Law Commission study is reviewed in the next chapter.

2. ONTARIO - GRANDVIEW TRAINING SCHOOL FOR GIRLS

The Government of Ontario operated a training facility for adolescent girls in Galt (now part of Cambridge) from 1932 to 1976. Originally known as the Ontario Training School for Girls - Galt, the facility was renamed the Grandview Training School for Girls in 1967. It housed girls between the ages of 12 and 18. Under the Ontario *Training Schools Act*,[176] the girls became wards of the Province and the parents of the girls relinquished their rights as guardians. The institution housed an average of 120 girls annually, with approximately one-quarter of them in a secure facility known as Churchill House. While some girls had committed minor crimes such as shoplifting, many were sent to the school because they had been pronounced "unmanageable" under the *Juvenile Delinquents Act*[177] for reasons such as truancy, the use of drugs or alcohol, or "sexual immorality." Many of the young women sent to Grandview had been physically, sexually or emotionally abused by family members; some were orphans, and some were from very poor homes whose families were unable to care for them.

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[176] R.S.O. 1980, c. 508.

A number of students at the school were abused during their residency there. The most significant period of abuse occurred in the mid-1960s to the early 1970s. The school was closed in 1976 after an investigation into the abuse. Residents alleged that they had been subjected to physical, sexual and psychological abuse at the hands of guards and other staff. Some of the allegations had been made contemporaneous to the abuse, but had not resulted in any legal proceedings at the time.

The abuse came to public light in 1991, when two women who were being treated by the same psychologist told him of very similar experiences of abuse that occurred at Grandview. The psychologist was shocked by the details, introduced the two women to each other and said that he would support them if they went public with their stories. The women subsequently made appearances on television, asking others who had been at Grandview to contact the police or the provincial Government. In the summer of 1991, the Waterloo Regional Police Service and the Ontario Provincial Police began a joint investigation into claims of physical and sexual abuse at the school.

In December 1992, a Victim Witness Program site was established in Kitchener, Ontario, with the express purpose of dealing with Grandview.[178] Some women retained lawyers and initiated civil suits. At the same time, a small group of women formed the Grandview Survivor's Support Group ("GSSG") to investigate options for seeking compensation on a collective basis. They also hired legal counsel (whose services were ultimately paid for by the Ontario Government). The group later expanded to include more than 300 women.

The Province decided to pursue, through mediation, an out-of-court strategy to settle Grandview claims. In May 1993, negotiations began between the Government and the GSSG. Over the next 10 months the executive of the GSSG and the group's legal counsel held extensive meetings with counsel from the Ministry of the Attorney General and the Government's Grandview Project Manager in an attempt to draft a compensation agreement. The Government provided funding during the negotiations for a crisis line dedicated to Grandview survivors and for continued participation in the discussions by the GSSG executive.

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[177] R.S.C. 1970, c. J-3.

[178] The Program provided support to the abuse victims, who might become witnesses at criminal trials. Specifically, it offered information about the court process and available community-based support services.

In early 1994, a Draft Agreement was formulated by the Government and the GSSG executive and put to a vote by the members of the GSSG. Over 127 women participated in the vote, and the Agreement was ratified by over 80%. After Government approval, the program was announced in June 1994.

The Agreement allowed all former residents of Grandview to apply for specified benefits and financial compensation from the Government through an alternative dispute resolution process rather than individually pursuing civil suits. It was a group agreement, but it permitted individual women to choose whether or not to participate in the program. Individuals were required to obtain independent legal advice (for which the Government provided $1,000 per applicant) before electing to seek compensation under the Agreement. Those who elected to do so had to provide a complete release of any claim they might have had against the Government of Ontario for damages arising out of their mistreatment at Grandview. Participation in the Agreement, however, did not restrict the individual's rights to bring criminal charges or civil claims against individual perpetrators of abuse.

An application cut-off date was set for January 2, 1996. Applications received after that date were not automatically rejected, but were considered on a case by case basis.

The purpose of the Agreement was outlined in its Overview:

> The purpose of this Agreement is to engage in a process to afford any eligible person real opportunities to heal and to introduce real hope for a better future ... [It] is designed to address the consequences of "abuse" and "mistreatment" as those terms are defined, of those who were actually resident at Grandview ... It is an objective of the various components of this Agreement to facilitate a path of healing and recognition of self-fulfilment for its beneficiaries. It is hoped that the coordination of the various components, will, as an integrated whole, produce a more accountable and effective response for survivors of institutionalized and sexual abuse.

(a) Details of the Compensation Package

The Agreement provided for three different types of benefits: general benefits (intended to benefit society as a whole), group benefits (for all former residents of the institution), and individual benefits (for those who claimed specific incidents of abuse). An Eligibility and Implementation Committee ("EIC") was established as an advisory body to oversee and superintend the implementation of the benefits package. This committee was composed of two GSSG-appointed members, one Government-appointed member and a chair jointly appointed by the Government and the GSSG. The Agreement also provided funding for the GSSG to enable it to continue to offer support to its members through meetings, outreach and a newsletter.

(i) General Benefits

General benefits were not necessarily confined to benefits to former residents of Grandview. They were defined in the Agreement as "programs, actions or commitments that the Government may undertake or foster and which may provide benefits to survivors of sexual, physical and institutionalized abuse generally."

The Agreement included specific provisions for legislative and research initiatives.

The main legislative initiative outlined in the Agreement was a bill to amend various provincial laws to extend or eliminate limitation periods for commencing civil proceedings in relation to sexual abuse. The Government also reviewed its hiring, training and abuse-reporting practices for programs involving youth in institutional settings or under state supervision.

Three research initiatives were contemplated in the Agreement. First, there was a proposal to evaluate the effect and effectiveness of the Agreement itself. This work was later conducted by Deborah Leach.[179] Results of her study are referred to in the applicable contexts below. Second, a recommendation was made to conduct research to better understand the dynamics of the consequences of abuse and to determine when and how to provide effective intervention. In this regard, the Government supported the production of a video and a booklet entitled "Until Someone Listens." Third, every applicant was given the choice to tell of her experiences at Grandview and have her history recorded.

The idea of establishing a Healing Centre was also discussed but not acted upon. Instead, some money was put aside for a needs assessment. However, these funds eventually went back to the Government's general revenue fund.

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[179] Leach, D., "Evaluation of the Grandview Agreement Process: Final Report" (June 1997).

(ii) Group Benefits

Group benefits consisted of a dedicated crisis line, money for the removal of self-inflicted tattoos and scars, and a general acknowledgement by the Government recognizing the efforts of the GSSG to bring to the attention of provincial authorities the allegations of abuse and to develop a non court-based process to assist the victims. The crisis line and money for the removal of tattoos and scars were available to all former residents of Grandview. Individuals applying to have a self-inflicted tattoo removed were required to swear a statement declaring when they attended Grandview and that the tattoo was inflicted during that time.[180]

The crisis line which was established by the Government of Ontario during the negotiations leading up to the Agreement was continued pursuant to the terms of the Agreement. Again, it was available to any former resident of Grandview without proof that she had been subjected to conduct at the school that could have caused or contributed to her crisis. The crisis line existed for four years and was closed March 31, 1997. Ms. Leach reported that a large majority of the women who accessed the service felt it made a positive difference in their lives. However, some felt that the counsellors were not always sufficiently knowledgeable about institutional abuse or Grandview.

The Government allocated $120,000 for a tattoo removal fund and $50,000 for a scar reduction fund. Fifty-two women had used this benefit as of December 1996, the latest date for which information was available. Ms. Leach found that the impact of tattoo removal was significant in improving self-esteem and the ability to live in the present.

The general acknowledgement referred to above was read out in the provincial legislature by the Attorney General, the Honourable Jim Flaherty, on November 17, 1999. It included an apology to all the Grandview survivors.

(iii) Individual Benefits

A number of individual benefits, including direct financial compensation, were available to former residents of Grandview whose assertions of abuse were accepted. Individuals had to apply for these benefits. Their applications were reviewed by an adjudicator who determined whether the claimant was in fact the victim of abuse and/or mistreatment (as defined in the Agreement) which caused injury or harm and, if so, what financial award was appropriate. An applicant whose claim was validated was also entitled to apply for a variety of additional non-financial benefits that were purchased by the Government from existing service providers on a case-by-case basis. The total Government expenditure on awards and benefits was $16,400,000.[181] The various available benefits are described below.

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[180] The individual also had to have resided at Grandview for at least six months.

Successful claimants were entitled to a financial award for pain and suffering as a result of abuse and/or mistreatment. "Abuse" and "mistreatment" were defined as follows:

> 1.1 ABUSE means an injury as a result of the commission of a criminal act or act of gross misconduct by a guard or other official at Grandview or in some circumstances by another ward and includes physical and sexual assault or sexual exploitation. It is acknowledged that sexual abuse includes arbitrary or exploitative internal examinations for which no reasonable medical justification existed and which resulted in demonstrable harm.
>
> Act of abuse is the act that causes injury.
>
> 1.2 MISTREATMENT means an injury as a result of a pattern of conduct that was "cruel" and for which no reasonable justification could exist (arbitrary) and includes conduct that was non physical but had as a design the depersonalization and demoralization of the person with the consequent loss in self esteem, and may involve discipline measures unauthorized by any superior authority. This is conduct that is plainly contrary to the policies and procedures governing conduct at Grandview and the purpose of the governing legislation. Proof must establish a pattern of conduct directed towards the individual personally and errors of judgement will not be sufficient. This conduct may include taunts, intimidation, insults, abusive language, the withholding of emotional supports, deprivation of paternal visits, threats of isolation, and psychologically cruel discipline or measures which were not officially permitted in the management and control of the residents of the facility.
>
> The general environment of Grandview, the discipline and regulation of the conduct of the wards in accordance with policies and procedures established for the governance and management of the institution cannot constitute mistreatment.
>
> The act of mistreatment is the act or acts that cause the injury.

In order to qualify for a financial award, an applicant had to demonstrate injury or harm which justified compensation beyond a nominal damages award. The range of available awards was from $3,000 to $60,000.[182] The precise amount conferred upon an applicant depended on the nature, severity and impact of the abuse and/or mistreatment. In determining the amount, the adjudicators were directed to use a prescribed matrix as a guide. This matrix set out the minimum and maximum award ranges for various categories of misconduct, and also itemized the type of evidence expected as proof. The adjudicators had the discretion to fix the award within the range prescribed. The matrix is reproduced in full below.

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[181] Some sources put the figure closer to $12,000,000.

[182] The Agreement provided that this money would not be counted in determining eligibility for Family Benefits and General Welfare Assistance.

ACTS ALLEGED	HARM/INJURY	EVIDENCE/PROOF	AWARD RANGE
Repeated serious sexual abuse (sexual intercourse anal/oral) & physical beating and threats.	Continued harm resulting in serious dysfunction. Adjudicator applies standards set out in Agreement.	Possible: Medical/ psychological/therapist/ police reports/direct evidence of victim if credible/witnesses/ documentary-conviction of perpetrator.	$40,000.00 - $60,000.
Physical abuse involving hospitalization with broken bones or serious internal injuries.	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above	$20,000.00 - 40,000.00 "mid range"
Isolated act of sexual intercourse/oral or anal sex or masturbation with threats or abuse of position of trust.	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above	$20,000.00 - $40,000.00 "mid range"
No physical interference- forms of "mistreatment" i.e. cruel conduct that was prolonged and persistent. Confinement in segregation alone will not attract an award. Segregation may be justified in accordance with administrative authority. Abusive segregation cannot be.	Long term detrimental impact - conduct must not have been lawful or condoned. The nature of the harm will determine once proof of the acts are accepted whether a minimal recovery or a higher award.	Same as above	$3000.00 on proof of acts of abuse or mistreatment. $10,000.00 - $20,000.00 where serious harm found by the adjudicator.

The Government of Ontario was responsible for 100% of the financial award. The average award conferred was a little under $40,000. In general, financial benefits were awarded for physical and sexual abuse and mistreatment. In certain cases, psychological abuse and mistreatment were compensated, but few awards were granted as a result of psychological abuse only.

Ms. Leach's study found that the vast majority of recipients thought the financial award helped them make a positive change in their lives. Most importantly, it contributed to a sense of validation, gave them some security and independence, improved their ability to take better care of their children and other important people in their lives, and helped them plan for their future with more skills. For a small number of recipients, the award caused difficulties in such matters as money management and demands from others for assistance.

In addition to any direct financial award, an adjudicator was also able to direct the Government to pay service providers additional sums up to $10,000 to cover exceptional medical or dental costs related to the consequences of the abuse and/or mistreatment where no insurance coverage was available.

The Government had established an interim therapy protocol to provide counselling and therapy, pending completion of the Agreement. Former wards were then entitled to apply under the Agreement for access to longer-term counselling and therapy. In order to qualify for such services, the applicant had to submit an application for individual benefits within six months of the ratification date of the Agreement. The application had to be accompanied by a treatment plan prepared by a therapist experienced in treating cases of abuse, and the therapist had to support the claimant's position that her experiences at Grandview likely caused or contributed to her present circumstances and that counselling was required. Alternatively, an applicant could request an assessment by a Government-approved counsellor.

All applications for counselling were reviewed by the Eligibility and Implementation Committee. Interim counselling services remained in effect pending the review. If a majority of the members of the EIC was satisfied that the requested counselling was appropriate, such services of a value not exceeding $5,000 for a period of one year could be approved. This could occur in advance of validation of the claim, but was subject to confirmation by the adjudicator. Provision was also made for additional funding in appropriate situations. Disputes between the EIC and the applicant (or her treating therapist) were to be resolved by designated independent experts.

In exceptional circumstances, applicants could also obtain up to $5,000 in funding for short-term residential treatment programs. Appropriate evidence of need was required, as well as evidence of the unavailability of alternative private or public funding. Applicants could access individual counselling services following completion of the residential program.

The vast majority of women interviewed by Ms. Leach indicated that the therapy and counselling benefit made a significant difference to them. It helped them with improving their self-esteem, going through the Agreement process, coping with their tragedy, and moving on in life. At the same time, many women were concerned about the limits to the funding. Many were unaware of the limits, and said they would have used the funding differently if they had been aware. Some recommended that the cap on this benefit be eliminated.

The Agreement provided for access to educational or vocational training or upgrading. The Government agreed to pay the "basic costs" of education or vocation programs approved by the EIC. Basic costs were defined to include tuition, books, course materials, a transportation allowance and, where need was established, child care and computer costs. The Government also agreed to pay for psycho-educational assessments to assist applicants in determining a suitable program of study or training. The only conditions of the benefit were that the applicant attend all classes, fulfill all course requirements and successfully complete the course of study. Ms. Leach reported that many applicants thought this benefit was extremely important, especially since education was something stolen from them at Grandview.

Successful applicants could obtain free debt counselling and debt consolidation and budget assistance. Ms. Leach reported that the reactions of those who availed themselves of this benefit were mixed, some finding it helpful and others finding it shameful.

A contingency fund of $3,000 per validated claim was set up. It was intended to cover expenses for the following matters not covered, or not covered sufficiently, by other benefits: medical and dental needs, child care and travel expenses incurred in relation to attending counselling sessions, books and other materials required for a course of study or therapy, and fees for attending workshops. Applications for specific expenses had to be submitted to and approved by the EIC, and need had to be established. Multiple applications could be submitted, but the money had to be used within two years of the date the Agreement was ratified. This was the most widely-used benefit. Most applicants used it for medical or dental purposes. All said it made at least some positive difference in their lives.

Finally, the Agreement provided that each successful claimant was entitled to receive an individual acknowledgement from the Government of the abuse or mistreatment, recognizing that each of the women was harmed and there could be no justification for the abuse. Delivery of these acknowledgements was delayed until the completion of all related criminal proceedings.

Reproduced below is a chart prepared by Goldie Shea for the Law Commission of Canada detailing the number of applicants who took advantage of the various available benefits as of October 1999.[183]

Grandview - Usage of Benefits

BENEFIT	NUMBER OF WOMEN WHO HAVE USED BENEFITS	PERCENTAGE OF WOMEN WHO HAVE USED BENEFITS
Therapy/counselling	123	91.8
Tattoo/Scar Removal	52	38.8
Contingency Fund	132	98.5
Educational/Vocational Assistance	46	34.3
Financial/Budget counselling	6	4.5
Total number of women who used at least one of the Agreement benefits	134	100

(b) The Process

As stated in the Report of the Grandview Adjudicators,[184] the adjudication process had multiple goals. First, it was a forum for the review and assessment of evidence relating to validation of claims and the assessment of damages. To this extent, the hearings were similar to other, more traditional, legal proceedings where judges review exhibits, listen to evidence, and make findings of fact based on legal standards and principles, including the onus of proof. Second, the Grandview hearings were intended to offer the applicants an opportunity to describe their experiences in their own words to someone with authority. Adjudication was to empower the survivors of institutional abuse to define the wrong that was done to them, to explain the repercussions on their lives, to demand accountability and the restitution of their dignity, and to claim official recognition of the injustice.

The procedure for validation of a claim was as follows. Applicants were restricted to former residents of Grandview or its predecessor, the Ontario School for Girls. Each applicant was required to complete an application outlining the abuse and consequent injuries she allegedly suffered. This had to be accompanied by a sworn statement as to the truth of the information given in the application, a statement releasing the Government from any further liability, and a declaration of having received independent legal advice.[185] The application could also be accompanied by supporting documentation gathered by the applicant.

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[183] Shea, Goldie, "Redress Programs Relating to Institutional Child Abuse in Canada" (October 1999), p. 33.

[184] *Report of the Grandview Adjudicators* (May 13, 1998), p. 10.

Two investigators appointed by the Government reviewed the information and determined if and when the applicant had been a resident at Grandview. They also reviewed the Crown ward files of the applicants to determine whether there was evidence of corroboration, inconsistency or other information relevant to the application. The application and all related documentation were then submitted to an independent adjudicator for review, assessment and validation.

The adjudicators were all female professionals in the law jointly chosen by the GSSG and the Government. Six in total were appointed. As a group, they had expertise in human rights, feminist legal theory, tort law, criminal law, family law, constitutional law, property law, access to justice, health law, aboriginal legal rights, minority language rights and adjudication within administrative tribunals. Feedback from the applicants suggested that it was very important that the adjudicators were female, with many indicating that they would have been uncomfortable discussing the intimate details of their claims with a man. In addition, the fact that one of the adjudicators was a native woman who could appreciate the unique experiences of aboriginal claimants was noted as being very important.[186]

Each applicant was entitled to an oral hearing before an adjudicator. The hearing was held in private and no transcript was maintained. The Government, the applicant and the GSSG were all parties to the proceeding and entitled to submit information to the adjudicator. The Government was entitled to attend the hearings and make representations, although no adverse inferences were to be drawn from the fact that the Government chose not to do so. The applicant was entitled to be represented by counsel. In practice, most hearings occurred without lawyers present.

The burden of proving the claim was on the applicant on a standard of a balance of probabilities. The applicant had to satisfy the adjudicator that the conduct complained of occurred, was not minor, and the injury sustained was substantial and prolonged. The decision of the adjudicator was final and not subject to appeal or other form of judicial review.

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[185] The legal advice was to ensure that the applicant understood the terms of the Agreement and the legal implications of signing a release.

[186] Report of the Grandview Adjudicators (May 13, 1998), pp. 5-6.

Hearings were held in various locations across the country. Efforts were made to select a venue that would accommodate the particular applicant's needs, and to provide as comfortable a setting as possible. As a result, hearings were sometimes held in an applicant's home or in an institution where an applicant was detained.

The hearings were designed to be informal and non-confrontational. Applicants were advised at the start how the hearing would proceed, and were given the opportunity to ask any questions they might have. Applicants were also informed that any notes taken during the proceeding would be private and confidential, and destroyed after a decision was rendered.

Applicants were asked at the outset to promise to tell the truth. The adjudicator then asked to hear about the applicant's experiences at Grandview, and any impact those experiences may have had. The adjudicators sought to give each applicant the chance to tell her own story. Follow-up questions were then asked to clarify confusing points and ensure that all the relevant issues were canvassed. Applicants were always given the opportunity to explain apparent inconsistencies.

According to section 4.2.5 of the Grandview Agreement, in assessing a claim, the adjudicator was obliged to consider the following:

> (A) How long was the claimant in residence?
>
> (B) What was the age of the applicant?
>
> (C) Were complaints made and if so when?
>
> (D) By whom were the acts committed? What was the relationship of the claimant to the person?
>
> (E) What was the frequency of the abuse and mistreatment? Was it an isolated act or a series of acts?
>
> (F) What was the nature and severity of the abuse and mistreatment?
>
> (G) What was the impact on the claimant? What was/is the consequence of the abuse? What treatment has been received for the injuries identified?
>
> (H) Were criminal charges laid; was there a conviction; was conduct criminal in nature? (It is understood that many of the hearings may be concluded before the on-going criminal investigations are concluded, and accordingly, no adverse inference should be made with respect to beneficiaries whose alleged perpetrators have not yet been charged or convicted. Furthermore, neither the laying of criminal charges nor a conviction are preconditions for certification and relief under this agreement.)

(I) Was the claimant a resident of Churchill House?

As suggested above, the types of material reviewed by the adjudicators included the following:

> 1) the applicant's written application outlining the abuse which she alleged that she experienced and describing the injuries suffered;
>
> 2) the applicant's sworn statement as to the truth of her application;
>
> 3) a certificate demonstrating that the applicant received independent legal advice regarding her options;
>
> 4) a statement releasing the Government from further liability, signed by the applicant;
>
> 5) documentation from the applicant's Crown ward file relevant to her claim, such as medical and dental records, reports of discipline, reports from the staff regarding the applicant's behaviour and progress (collected and compiled by the investigator);
>
> 6) transcripts from interviews conducted with the applicant by police officers investigating criminal charges, if any existed; and
>
> 7) supporting documentation, such as therapists' reports or other medical reports submitted by the applicant.

In practice, the primary focus of the fact finding exercise rested upon the oral evidence given by the applicant herself. The adjudicator assessed the applicant's credibility by observing her demeanour and considering the content of her evidence and any previous statements she had made on the issues.[187] The adjudicators found that the Crown ward files sometimes provided useful information, but were concerned that these records were primarily compiled by the staff of the institution, and therefore might have been coloured by self-interest. As such, they did not always represent reliable accounts of what transpired. Supporting written materials submitted by the applicant (usually reports of therapists, psychiatrists and other medical personnel) were also of some use, but these documents were created long after the applicant's time at Grandview, and thus were not always cogent evidence about what actually happened to the applicant at the school.

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[187] The adjudicators sought to account for factors which might affect an applicant's style of communication, such as culture, race, personality, and emotional and psychological state.

Once an application had been validated, the applicant received a decision prepared by the adjudicator.[188] The Agreement stated that the reasons for the decisions were confidential and were not to be published by the parties. At the outset, the four original adjudicators deliberated as a group to establish a template that would be used to structure the reasons for the decisions. This template was developed after consultation with counsel from the Ministry of the Attorney General and counsel for the GSSG. The actual decisions generally conformed to the template, but adjudicators departed from the standard format where particular cases so warranted. Most decisions were, therefore, uniform in structure, but unique in their description of the facts proven in the individual case.

The decisions included both a narrative account of the incidents of abuse and a description of the consequences of the abuse – the harm or injury experienced by the applicant and the effect of the abuse on her life. At the outset, the adjudicators agreed that the account of the incidents should be quite detailed so as to capture the extent and range of abuse and mistreatment that occurred at Grandview, using the applicant's own words to the greatest extent possible. In this way, each decision would create a detailed historical record of what transpired at the training school. By contrast, references in the decision to the detrimental effect of the abuse on the applicant's lives were deliberately left brief to avoid freezing the applicant's life in relation to the damage done, or labelling an applicant in stereotypical terminology. These practices were adopted in light of the goal of the Agreement to make the process one in which healing could take place.

The reasons for the decision were written primarily for the applicant, not for the other parties to the proceeding or as a precedent for other cases. The narrative was designed to recount what the adjudicator concluded had been proven on a balance of probabilities. In addition, the narrative sometimes mentioned an incident which was not compensable, but was a source of pain and frustration for the applicant. The decision thereby sought to provide justification for the adjudicator's findings and also served as a record of the applicant's perspective of wrongs suffered. Feedback from the applicants after receiving their decisions suggested that this aspect of the decisions was very important to them.

Although adjudicators sat individually, each decision was informally reviewed by a second adjudicator before release. Two adjudicators were responsible for reviewing each other's decisions for a defined period of time, with the pairs being changed every few months to ensure overall consistency. The review adjudicator made suggestions regarding changes to the draft decision, but the final determination remained with the adjudicator assigned to the case. Where a particular decision required special or difficult interpretation of the Agreement, drafts were circulated to all adjudicators for comment. The goal of this review process was consistency in the quantum of compensation and the interpretation of the language of the Agreement. In addition, it provided adjudicators with much wider knowledge and exposure to evidence being adduced during the hearings. Adjudicators also held group meetings regularly to review the procedures being used in the hearings and the decisions being rendered. The adjudicators found these meetings extremely useful and recommended that they be incorporated as an on-going and integral part of adjudicators' workload in future adjudicative processes.

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[188] The applicant was also sent a package of information describing the benefits for which she could apply.

In the end, 329 claims were resolved within two-and-a-half years. Most were validated. The adjudicators determined, on a balance of probabilities, that some former residents had been sexually, physically and/or psychologically abused and mistreated at Grandview. They also determined that the abusive treatment contributed to serious, prolonged and substantial harm.

In their Report on the process, the adjudicators suggested that the Agreement process allowed them to make reliable findings of fact, and that it may be preferable to evaluate evidence of institutional abuse without requiring all the elements of the adversarial model of litigation. In her evaluation, Ms. Leach found that applicants also viewed the adjudication process positively. In particular, they liked that the process offered the opportunity, in a relatively safe context, for women to tell their stories and have their experiences acknowledged. One notable area cited for improvement related to the use of more understandable (i.e., less legalistic and complex) literature for use by applicants to assess their rights and access benefits.

3. ONTARIO - ST. JOHN'S AND ST. JOSEPH'S TRAINING SCHOOLS

St. John's Training School was a training school for boys, located in Uxbridge. St. Joseph's Training School was another training school for boys, located in Alfred. Both were operated by the lay order of the Brothers of the Christian Schools under the supervision of the Government of Ontario. Residents at the schools included orphans, truants, Children's Aid Society referrals, juvenile delinquents (as they were then known), physically and perceptually challenged children, "incorrigibles" from reservation schools, and children of broken or poor homes which could not adequately support them. St. Joseph's was closed in the 1970s. St. John's continues to operate as a youth detention centre, under a different name, but it no longer has any association with the Brothers of the Christian Schools.

Allegations of abuse at St. John's and St. Joseph's surfaced publicly in 1990. Following the Winter Commission's inquiry into sexual abuse at church-run institutions in Newfoundland,[189] former residents of both schools came forward with allegations of physical and sexual abuse at the two Ontario schools. This abuse had occurred mainly between 1930 and 1974, with some isolated cases in the 1980s. The Ontario Provincial Police began a extensive investigation in the early 1990s and eventually laid charges against 28 Christian Brothers from both Schools and one employee from St. Joseph's. The charges covered almost 200 counts of abuse, ranging from assault causing bodily harm to indecent assault and sodomy. Some of the accused were ultimately convicted.

Recognizing a commonality of interest, the former residents who had come forward in 1990 decided to form an unincorporated association in order to seek some kind of redress. They named the association Helpline. By December 1990, Helpline had about 300 members.

Helpline proposed that an alternative dispute resolution model be negotiated amongst the Toronto District of the Brothers of the Christian Schools (which ran St. John's), the Ottawa District of the Brothers of the Christian Schools (which ran St. Joseph's), the Government of Ontario and the Roman Catholic Archdioceses of Toronto and Ottawa (the two Archdioceses in which the Schools were located). All parties except the Toronto Brothers agreed to participate, and negotiations began in early 1991. The Toronto Brothers occasionally sat in on the negotiations, but never became an active participant. They also never joined the redress program that was ultimately negotiated.[190]

The negotiation process involved the use of a Convenor acceptable to all parties, as well as the assistance of an expert in alternative dispute resolution. Funding for Helpline was paid by the other negotiating parties (except the Toronto Brothers) on the basis of a cost-sharing agreement arrived at in June 1991. Interim counselling services were offered to Helpline members.

After more than one and a half years of intense negotiations, an Agreement was reached in August 1992. Helpline, the Ottawa Brothers, the Archdioceses of Ottawa and Toronto and the Ontario Government were all "participants" in the Agreement. This Agreement was later ratified by 95.3% of the membership of Helpline,[191] each of whom signed a release waiving any right to sue the participants in civil proceedings. (The waivers did not prevent them from suing the actual perpetrators.) Implementation of the Agreement began in January 1993.

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[189] Winter, G.A., *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, Submitted to the Most Reverend A. L. Penney, D.D., Archbishop of the Archdiocese of St. John's (St. John's, Nfld.: Archdiocese of St. John's, June 1990).

[190] Legal action was later commenced against the Toronto Brothers by several Helpline members. The Toronto Brothers began making financial offers to the former students, some of whom accepted and some of whom did not. Details of the settlement agreements are not available because they are considered private agreements between the former students and the Catholic Church.

The Agreement entitled former residents of the schools who had been abused to financial compensation as well as access to various other benefits. Specifically, the Agreement stated that the objective of the package was to meet the participants' "collective moral responsibility to work to heal the impact of abuse in those cases validated through access to the opportunities contained in [the] Agreement and to help restore lost trust in the spiritual and secular institutions of ... society." A commitment to help eradicate abuse generally and its underlying causes was said to transcend the Agreement.

In the end, the total number of Helpline claimants was 1,025. All the claims have now been resolved. The costs of the Agreement, including the implementation costs and the operating expenses of Helpline,[192] were borne by the Government, the Ottawa Brothers and the two Archdioceses.

(a) The Process

All former students of St. John's and St. Joseph's were eligible to apply for benefits. Claimants were processed in three groups. Group I consisted of 354 former students who were members of Helpline or who had made a statement to the police as of June 24, 1992.[193] Group II consisted of 241 former students who had joined Helpline or made a statement to the police after June 24, 1992, but before April 1, 1993.[194] A third group, known as post-Group II, consisted of both former students on a list submitted by Helpline on March 3, 1995, and any individuals who came forward after that date. As explained below, the process and available benefits for claimants from post-Group II varied somewhat from that for claimants from the first two groups.[195]

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[191] For purposes of the vote, the membership of Helpline was defined as the members of Helpline "with whom it was in active contact, which in the opinion of the Chair [were] representative of the overall profile of Helpline members."

[192] A maximum of $120,000 was designated for Helpline's operating expenses.

[193] Spouses of these individuals who had become widowed after January 1, 1990, were also eligible to apply.

[194] Again, spouses of these individuals who had become widowed after January 1, 1990, were also eligible to apply.

Each claimant had to fill out a sworn Application for Compensation detailing, among other things, the nature of the abuse experienced, the injuries suffered, any treatment received, and the particulars of any report made to the police about the abuse.[196] The claimant was also required to sign an Authorization for Release of Information, consenting to the release of information from treating doctors, employers, insurance and pension companies, and various public bodies. Supporting documentation could be given along with the application. Collectively, all this information was called the Claim Form.

A Reconciliation Process Implementation Committee ("RPIC") was established to help implement the Agreement. RPIC was composed of two representatives of Helpline, one representative of each of the other participants, and an independent third party who sat as Chair.[197]

Within two weeks of receipt, RPIC would review each Claim Form and make any comments it considered appropriate.[198] It would then forward the materials to a member of the Ontario Criminal Injuries Compensation Board who had been designated to hear claims under the Agreement ("CICB-designate"). RPIC would also forward any records that it thought might support or undermine any part of the claim.

RPIC had the right not to forward claims that it deemed to be unfounded. These claims were rejected, without prejudice to the claimant's right to reapply. A claim could only be rejected if all the members of RPIC agreed that it was unfounded. In the absence of consensus, the Chair determined whether the claim would be forwarded to the CICB-designate without qualification or with the recommendation that it be closely scrutinized. In practice, some claims were returned to the claimants, together with the releases they had signed. They were told that they were free to pursue civil actions, if they saw fit.

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[195] The dates defining the various groups were of no particular significance. Cut-off dates were simply required for budgeting purposes, and to allow the participants to decide whether to continue the program.

[196] If the claimant had not made a report to the police, he was asked to explain why he had not.

[197] Douglas Roche, now Senator Roche, who had acted as Convenor during the negotiations, was named in the Agreement as Chair. There is no doubt that Mr. Roche, a prominent Catholic and former ambassador, brought a great deal of credibility to the process; his involvement greatly facilitated the negotiations that led to agreement.

[198] If the claim was not complete, RPIC would assist the claimant in perfecting it.

The CICB-designate determined whether the claimant was entitled to an award for pain and suffering from abuse suffered at one of the schools. Abuse was defined as an injury (as defined in the *Compensation for Victims of Crime Act*)[199] resulting from a criminal act. In making the determination, the CICB-designate was directed to consider the Claim Form, the comments of RPIC, and any evidence and information from the claimant. The burden to prove the abuse rested with the claimant on a balance of probabilities.

Each claimant was entitled to a hearing before the CICB-designate. The hearings were private and claimants were directed not to discuss evidence revealed at the hearing with anyone until all the hearings had been completed. The claimant, his family, legal or other advisor, and counsellor were entitled to attend the hearing, as were RPIC and the Recorder (a person designated to make a record of the events which occurred at the schools). The claimant was also entitled to request the assistance of legal counsel. If RPIC considered the request reasonable, it would make efforts to ensure that counsel was made available through (what was then called) the Ontario Legal Aid Plan.

At the hearing, the claimant would tell the CICB-designate his story of what happened. The evidence was given under oath, and the claimant was advised of the seriousness of not telling the truth. The CICB-designate evaluated the credibility of the claimant's evidence.

A claimant could waive an oral hearing if RPIC determined that the claim was complete and supportable without a hearing, and the CICB-designate concurred that the determination may be made without a hearing.

For claimants in Group II, a provision was added that allowed participants not satisfied with an application to subject the claimant to videotaped testimony prior to the hearing. This option was exercised for 15 claimants, none of whose claims were denied by the CICB-designate. Later on, a system of documentary hearings was initiated for Group II claimants, for which a personal appearance by the claimant was not required,[200] although claimants retained the right to a second, personal appearance if they so desired.

Once a determination was made that the claimant suffered abuse, the CICB-designate would make an award for pain and suffering. In making the award, the CICB-designate was directed to consider the Claim Form, any information from the claimant, as well as "such materials as it (sic) deems appropriate." For claimants resident in Ontario, the CICB-designate would also make a determination, based on "appropriate material," of the counselling costs for the benefit of the claimant and his or her family. No appeal was available from any of the CICB-designate's decisions.

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[199] R.S.O 1990, c. C-24.

[200] This could only occur with the consent of all the participants to the Agreement.

The total number of Group I and II claims considered was 595. Of these, 580 (97.5%) were validated. Only 15 were denied. Douglas Roche, the former Convenor and Chair of RPIC, said later that the process proved to be victim-friendly.[201]

For post-Group II claimants, a new Memorandum of Understanding was signed by the Government of Ontario, the Ottawa Brothers of the Christian Schools and the Archdioceses of Toronto and Ottawa. The Memorandum indicated that the participants wished to conduct the process in an accelerated manner. The RPIC administrative process was abandoned, and claims were sent directly to the Abuse in Provincial Institution Office of Ontario. The participants wrote to each claimant by March 31, 1996, and provided them with background information, a release form, an application and other pertinent information. A claimant had until July 1, 1996, to send in his application.

Each application was processed by a CICB-designate by either a documentary or oral hearing, although any of the participants or the claimant could insist upon an oral hearing. A participant was entitled to submit comments on the application. Any such comments were sent to all the other participants and the claimant. To enable the claimant to respond to comments of a legal nature, legal services up to a maximum of $450 were provided.

After reviewing all the information, the CICB-designate decided whether abuse took place and harm resulted. If so, an appropriate award for pain and suffering was granted. No appeal was available.

(b) Details of the Compensation Package

Both financial and non-financial benefits were available under the Agreement to validated claimants. The details of the various benefits available to Group I and II claimants are outlined below. The available benefits differed slightly for post-Group II claimants. Details of those benefits are outlined at the end of this section.

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[201] Roche, Douglas, *Reconciliation: An Ongoing Process. RPIC Chairman's Personal Report*, p.7.

As indicated above, each claimant whose claim of abuse was validated was entitled to an award for pain and suffering. The Agreement contemplated that an average award would be $10,000.00. As it turned out, the average award was $10,258 for Group I claimants and $8,129 for Group II claimants.

The Government of Ontario was responsible for covering the cost of the awards. The Agreement stipulated that the Government was to pay the award to RPIC within 30 days of validation or eight months of ratification of the Agreement, whichever was later. RPIC was then responsible for disbursing the funds to the claimant. A claimant could receive the award as a lump-sum payment or request that all or a portion of the award be paid as a structured settlement over a number of years. A claimant could also request investment counselling advice.

For each validated claimant from St. Joseph's, Additional Compensation for Pain and Suffering equal to 1.6 times the CICB-designate award was made by the Ottawa Brothers of the Christian Schools. Where a claimant was abused at both St. John's and St. Joseph's, the Ottawa Brothers contributed according to the proportion of time the claimant spent at St. Joseph's. The funds were disbursed through RPIC, and were to be paid within 30 days of the award or 18 months of ratification. A total of $5,708,000 was disbursed to Group I and II claimants under this heading.

The Ottawa Brothers also contributed as Discretionary Compensation a further 25% of the award they granted as Additional Compensation for Pain and Suffering. These funds were distributed as directed by the CICB-designate on a pro rata basis. A total of $1,427,000 was disbursed to Group I and II claimants under this heading. The money was distributed after all the Group I and II claims had been considered.

During negotiations leading to the Agreement, it was always hoped that the Toronto Brothers of the Christian Schools would sign on to the Agreement. Mr. Roche has indicated that when that did not occur, Helpline found itself in a dilemma. The organization wanted to maintain solidarity among its members, irrespective of which school they attended, but the former St. John's students could not expect to receive the Additional and Discretionary Compensation that would have come from the Toronto Brothers. In order to resolve this situation, and to raise funds to launch legal action against the Toronto Brothers, Helpline devised an Internal Sharing Agreement, whereby former St. Joseph's students would share their extra compensation with their St. John's colleagues, with a certain amount dedicated for anticipated legal expenses. Additional and Discretionary Compensation funds were thereafter paid not to individual claimants, but to a holding company that allocated the funds accordingly. Mr. Roche has noted further that when the Toronto Brothers managed to settle claims with some former students of St. John's, difficulties arose when the St. Joseph's members did not receive back the monies advanced under the Sharing Agreement.[202]

Each of the participants other than Helpline jointly contributed $3,000 per successful claimant to an Opportunity Fund. This was a fund intended to assist claimants with medical and dental needs, vocational rehabilitation, educational upgrading, and literacy training. A validated claimant (or a member of his family) was eligible for such assistance when the claimant expressed such a need, it appeared that the need was realistic and that the claimant might be expected to benefit, and the need could not readily be met by other private or public programs. The assistance was available as of 12 months after the date of ratification. The amount of assistance was determined by RPIC, but could not exceed $3,000 per claimant until 12 months had passed since the last claim was dealt with by RPIC. After that date, the funds were disbursed until exhausted on a first come first served basis. As of June 30, 1996, 547 validated claimants had been paid a total of $643,271 out of the fund.

A concern was expressed during the negotiations by some members of Helpline that they had not been paid for menial and farm labour performed during their stays at St. John's and/or St. Joseph's. The Ottawa Brothers denied owing any such wages, but as a gesture of good faith contributed money towards wage loss. The money was paid six months after ratification and distributed according to a formula worked out by Helpline. The total funds disbursed for Groups I and II amounted to $283,500.

Successful claimants were entitled to assistance with counselling costs for both themselves and their families. As noted above, for residents of Ontario the CICB-designate would make a determination of counselling costs at the same time as making an award for pain and suffering. These counselling costs were borne by the Ontario Government, which entered into an agreement with the Family Service Centre of Ottawa-Carleton. The Centre determined the needs of claimants and approved service providers. Once a treatment plan was in place, the Government disbursed the funds. Counselling requests were only entertained for a maximum of five years, unless the Government authorized an extension.

The counselling costs of those claimants and claimants' families who resided outside of Ontario were paid by the Ottawa Brothers and the Archdioceses of Toronto and Ontario. Each participant contributed $250,000 to a fund administered by RPIC.

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[202] *Ibid.*, pp. 9-10.

Four hundred and sixty-eight individuals in Groups I and II took advantage of the counselling assistance, for a total cost of $1,570,561. In-province counselling paid for by the Ontario Government accounted for approximately 80% of these costs. Out-of-province counselling covered by the other parties accounted for the rest.

The importance of collective and individual apologies was recognized in the Agreement. However, there was no specific provision for the giving of apologies; the participants simply agreed to develop criteria to address the issues of entitlement, content and timing of apologies. This was done so as not to prejudice any related criminal proceedings. The participants later signed a confidential Companion Agreement. That Agreement entitled all validated claimants to request a personal apology "by a particular individual or representative of the participant making the apology." One hundred and nineteen claimants requested such apologies. The Government of Ontario and the Archdioceses of Toronto and Ottawa also delivered separate public apologies.

The participants to the Agreement stipulated that they were committed to ongoing research and public education with respect to the prevention of child abuse. In that regard, the Agreement spelled out measures already taken by the Ottawa Brothers and the Archdioceses of Toronto and Ottawa in response to the St. John's and St. Joseph's experience. Among other things, the groups had adopted new policies on how to respond to allegations of child abuse, and had funded educational programs about such abuse. The Government of Ontario also committed itself to developing and improving policies and strategies directed at the prevention and early identification of child abuse. The Ministry of the Solicitor General and Correctional Services subsequently adopted several different initiatives in pursuit of those goals.

The last element of the Agreement was provision for a Recorder. The Recorder's task was to record the experiences of each person who attended or worked at either school and who wished to be heard. The participants believed that the abuse should be memorialized so that lessons could be learned and similar events prevented through public education. The Recorder was also required to prepare a report containing an outline of the relevant history of the schools and recommendations designed to assist in the prevention of abuse in institutional settings. This Report was submitted to RPIC on September 30, 1995.

A total of $14,500,000 in cash benefits was awarded to validated claimants in Groups I and II. The highest amount paid to one claimant was $107,944, the lowest $2,500. An average of $33,700 per claimant was paid out in awards, benefits and support costs.

As noted above, a separate Memorandum of Understanding was signed to deal with post-Group II claims. In many respects, the benefits available under the Memorandum were the same as under the earlier Agreement. However, there were some differences. Discretionary Compensation was no longer available. Money for lost wages was no longer given to claimants. Instead, the Ottawa Brothers agreed to donate $200 in the name of each validated claimant to the Family Service Centre of Ottawa-Carleton to further public education in societal response to child abuse. Counselling both in and out of Ontario was still available, but only for one year (absent demonstrated need for an extension). The maximum amount available for counselling was $10,000 per validated claimant. The claimant's immediate family was only entitled to short-term counselling based on clinical need. Finally, money was no longer contributed to an Opportunity Fund. Instead, the Archdiocese of Ottawa and the Ontario Government agreed to pay each St. Joseph's validated claimant $3,000 to use for educational and medical purposes. The Archdiocese of Toronto agreed to pay the same amount to St. John's validated claimants.

4. ADDITIONAL OBSERVATIONS ON ONTARIO INSTITUTIONS

There are differences between the approaches agreed upon by the Ontario Government for responding to the Grandview claimants as opposed to the St. John's and St. Joseph's claimants. Although this is explained, in part, by distinctions between the two situations and the negotiations that accompanied each, it also reflects the fact that the Helpline agreement predated Grandview. Lessons learned were incorporated into the more detailed Grandview agreement.

As described earlier in this Report, the Nova Scotia Government invited Tom Marshall, Q.C., one of the architects of both Ontario programs and a senior official with the Ontario Ministry of the Attorney General, to explain the Ontario approach to Cabinet and other officials. Mr. Marshall also met with my staff on several occasions, for which I am grateful, to outline some of the nuances of the Ontario programs not necessarily captured in the documents. I wish to highlight several here.

In both Ontario programs, the formation of a claimant or survivor advocacy group was regarded as fundamental to the creation and implementation of the agreements. These groups provided a single point of access to claimants. They gave those claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct involvement of the advocacy groups with the Government promoted a degree of trust, and facilitated reconciliation, healing and a sense of empowerment on the part of claimants. Marshall was also of the view that the advocacy groups recognized the detrimental effect that false claims would have on the overall credibility and success of the program and, as a result, engaged in some self-regulation or screening of claims brought forward, as did counsel on their behalf. Indeed, he felt that the legal profession must assume some ethical responsibility in this regard, and not just take a story and put it forward without any scrutiny or introspection as to its truth.

Although the lawyers for each of the advocacy groups played an important role in the development of the agreements, they ultimately had a much diminished part in the implementation of the agreements. Most claimants chose to be unrepresented by counsel during the fact finding process.

Like the Nova Scotia Compensation Program, both Ontario programs ran concurrently with extensive police investigations. Indeed, a number of criminal prosecutions also took place. Mr. Marshall advised that the programs recognized the importance of not interfering with or harming ongoing criminal investigations or prosecutions. Claimants were not assured that their claims for compensation would be kept confidential. On the contrary, they had to be prepared to disclose to the police. Indeed, many claimants who alleged serious abuse were directed to the police who took their formal statements.

The programs recognized that compensation could be awarded prior to the conclusion of any related criminal proceedings. Nonetheless, in practice, a number of claims were deferred until the completion of the criminal process. As well, the police shared information with the programs as to the product of their investigations and the veracity of individual claimants. This information was utilized in evaluating the merits of the claims.

Neither Ontario program had to contend with multiple claims of abuse directed against current staff members. Mr. Marshall recognized that this represents a significant distinction between the Ontario and Nova Scotia situations. In his view, this factor might well compel a redress program to defer processing an application for compensation until any existing criminal proceedings against a current employee are completed. (Indeed, this is generally the way in which this issue was dealt with when it arose in connection with alleged abuse at the Sir James Whitney School for the Deaf in Belleville, Ontario.) As well, Mr. Marshall felt that a mechanism would have to exist to permit such employees to be heard before the completion of the criminal process.

5. ONTARIO - GEORGE EPOCH

Father George Epoch was a Roman Catholic priest and a member of the brotherhood of Jesuit Fathers of Upper Canada ("the Jesuits"). He served the native communities on the Saugeen and Cape Croker reserves between 1969 and 1983. He was then transferred to Holy Cross Mission in Wikwemikong, where he stayed until his death in 1986.

Father Epoch sexually abused a number of the male and female residents of the reserves during his tenure. After his death, the community of Cape Crocker began to demand that the Jesuits acknowledge the abuse and compensate the victims. Twenty-two lawsuits were also filed by residents of the Cape Crocker reserve.

The Jesuits responded to the claims by conducting an investigation into Father Epoch's actions. It uncovered an extensive history of sexual abuse by the late priest. The Jesuits accepted moral but not legal responsibility for the abuse, and attempted to help the victims by providing financial assistance through an informal program known as "Appropriate Assistance." The program was not a success. Funds were distributed somewhat arbitrarily – some victims obtained compensation while others did not – and no provision was made for counselling or other benefits. In 1993, after spending approximately $2,000,000, the Jesuits abandoned the program, believing that few concrete results had been achieved.

On August 30, 1992, the Ontario Jesuit community issued a public apology for the abuse. Some informal meetings followed between a small group of victims and the Jesuits. Both parties wanted to achieve reconciliation, and formal negotiations began in 1993 towards an alternative to traditional civil litigation. Legal counsel on behalf of the victims and the Jesuits conducted the negotiations, assisted and advised by a neutral third party who had experience in such matters. Funding for the negotiations was provided by the Jesuits.

The negotiations were ultimately successful. On October 31, 1994, the Reconciliation Agreement between the Primary Victims of George Epoch and the Jesuit Fathers of Upper Canada was ratified. The "primary victims" were a number of women and men who alleged that they had been abused by Father Epoch on the reserves. Additional primary victims ratified the Agreement over time. In the end, a total of 97 ratified the Agreement.[203]

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[203] Eleven individuals who claimed they were abused but did not ratify the Agreement instituted civil proceedings against the Jesuits and the Diocese of Hamilton for the abuse. As of July 24, 2001, the Jesuits had settled with each of the litigants. Proceedings against the Diocese of Hamilton were still ongoing.

The spirit and objective of the Agreement were reflected in its Overview:

> The Participants have agreed that the healing of all those who were abused by George Epoch is most likely to occur through a process of reconciliation. Thus this Agreement represents the best alternative for those who were abused. The Jesuits wish to provide benefits that are accessible, fair and just, to those victims whose claims of abuse are validated. Moreover, the reconciliation process also benefits the Jesuit community. For the Jesuit Order recognizes that it has a moral responsibility to work to heal the impact of abuse on the victims, and to help restore lost trust in the spiritual and secular institutions of our society.

Applications for benefits under the Agreement were accepted until May 1, 1995. The program closed at the end of 1998.[204]

(a) The Process

All persons who had been subject to "physical sexual abuse" were entitled to apply for benefits under the Agreement. The Agreement did not provide a definition of physical sexual abuse. A condition of every application was that the claimant release the Jesuits, the estate of Father Epoch and the Diocese of Hamilton from any further claims for compensation arising out of the abuse.

A claimant began an application for benefits by completing a Claimant Information Form and Request for Apology. The Form sought information as to the particulars of the claimant, as well as the details of the claimant's past and present medical treatment. The claimant was also required to complete a Story of Abuse, outlining the details of the abuse committed by Father Epoch, the psychological injuries suffered as a result, and the particulars of any previous reports of the abuse made by the claimant to any person in authority. If the claimant had not reported the abuse, he or she was asked to explain why. Claimants were assisted in completing these forms by the Assessor, the person responsible for deciding whether to validate the claim.

The application forms were received by the Reconciliation Implementation Committee ("the Committee"). The Committee was composed of one representative of the primary victims, one representative of the Jesuits, and an "independent and impartial" Chair. It was responsible for ensuring the proper implementation of the Agreement. It also appointed the Assessors. It did not review or evaluate the applications for benefits. One hundred and fifty thousand dollars was set aside for its work.

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[204] Some primary victims who ratified the Agreement subsequently instituted civil proceedings against the Jesuits and the Diocese of Hamilton, claiming that they did not agree to the compensation program with full knowledge and awareness of the consequences. As of July 24, 2001, the Jesuits had settled with all the litigants. Proceedings against the Diocese of Hamilton were still ongoing.

The Assessors were responsible for conducting the validation process. Two Assessors were appointed. Both were aboriginal with a community or social work background. Neither had legal training.

The Assessor reviewed the application completed by the claimant, as well as any supporting documentation provided. The Assessor also conducted one or more private interviews with the claimant "in order to encourage a spontaneous, detailed statement." All information was received in confidence.

In evaluating the claim, the Assessor was entitled to consider the statement-validity analysis developed by John Yuille of the University of British Columbia. Yuille was a professor of psychology who had developed a method for determining the validity of a claim, based on "the presence or absence of certain characteristics, which are typical of how humans recall and describe remembered events, particularly in the area of sexual abuse."

The Assessor determined a claim on a balance of probabilities. If the Assessor found that the claimant was physically sexually abused by Father Epoch, then the claim was validated, and there was no appeal. If the claim was not validated, the claimant was entitled to repeat the application process with the second Assessor, who was available on a standby basis. The second Assessor could either validate the claim or reject it. In either case, there was no further appeal. In the end, 83 of 97 claims were validated.

The Jesuits paid for the costs of the validation process. The Agreement stipulated that the costs were not to exceed $40,000.

(b) Details of the Compensation Package

Each validated claimant was paid $25,000 as financial compensation for the abuse. The money was paid by the Jesuits and delivered to the claimant within 30 days of validation. However, each claimant had the option of receiving payment periodically over time or of placing the money in a trust fund for the benefit of the claimant and his or her family. The Agreement stipulated that the compensation was deemed to be an award for pain and suffering, and thus it was generally not subject to income tax. It was also excluded from income for purposes of determining eligibility for social assistance payments.

The Jesuits also agreed to pay up to $25,000 for the services of a financial consultant. The consultant was named by the Committee, and offered financial counselling to validated claimants.

Within 30 days of validation, each claimant was sent an application form for seeking payments from a Vocational Opportunity Fund. This was a fund dedicated to providing assistance to the claimant and his or her family for educational upgrading, vocational training, and medical and dental treatment. The maximum available award (for claimant and family) was $4,000. No additional money was set aside for the fund. Instead, payments came out of the $150,000 allocated to the Committee for its fees and expenses. Applications for payments were reviewed by the Committee, and all payments were made as directed by the Committee. The Agreement stipulated that the Committee was to make awards based on the best interests of the validated claimant.

Every validated claimant received an individual written apology from the Jesuits, delivered within 30 days of validation. Claimants submitted a request for an apology along with their application for benefits. They were entitled to outline what they wished the apology to contain, and the Jesuits agreed to comply with any reasonable requests in that regard. If the Jesuits did not consider a request to be reasonable, they were entitled to seek the opinion of the Chair of the Committee. The Chair's decision as to whether the request was reasonable was binding.

The Jesuits also agreed to publish an institutional apology, in which they expressed their "sorrow, regret and humility" for Father Epoch's acts. The apology was sent to the Chiefs of the Band Councils at Cape Crocker, Saugeen and Wikwemikong, with a request that it be printed in Band newsletters. It was also sent to the principal newspapers serving each of those communities, again with a request that it be published. A model homily based on the institutional apology was sent to the parishes where Father Epoch served, to be delivered by parish priests at a Mass dedicated to victims of child abuse. All claimants were notified by mail of the dates and locations of these Masses.

All claimants were entitled to receive counselling services of various types (including individual and family counselling, group counselling, self-help support teams, and telephone crisis intervention). Eligibility was not dependent on validation of a claim, but simply upon submission of a claim. Family members of claimants were also eligible for counselling services, although priority was given to those who were actually physically sexually abused by Father Epoch.

The Jesuits contributed $400,000 towards the establishment of a multi-faceted counselling program. This was a program in which various therapists and support personnel were specifically contracted to provide individual and family counselling services to claimants and their families. It lasted for three years, and was established and supervised by a Counselling Advisory Group ("the CAG"), made up of one representative of each of the Jesuits, the primary victims and the "applicable Chiefs and Council." The CAG was accountable to the Committee. A Co-ordinating Therapist was hired to supervise and direct the contract therapists.

The Jesuits also contributed an additional $100,000 for discretionary counselling. This money was used to permit primary victims to seek counselling outside of the established counselling program. The victim's choice of therapist for discretionary counselling was subject to the approval of the CAG.[205]

The frequency and length of counselling for particular claimants was determined at the discretion of the therapists providing direct clinical services, subject only to the financial limitations of the program and the overriding discretion of the Co-ordinating Therapist, the CAG and the Committee. Efforts were made to make the counselling services geographically accessible to the claimants. The CAG was also directed to maximize the available counselling services by applying for access to cost-shared counselling programs funded by one or both of the federal and Ontario Governments.

A Recorder was appointed by the Committee for the purpose of memorializing the history of abuse by Father Epoch. The Recorder afforded a private interview to any claimant who wished one, as well as to anyone else who had relevant information and who wished to be heard. He outlined the abuse in a Report to the Committee, and also made observations and recommendations designed to assist in the prevention of future abuse in institutional settings. A copy of the Report was sent to all validated claimants.

The total cost of the Agreement was approximately $2,500,000. All expenses were borne by the Jesuits. The amount allotted for counselling was not all spent, and the remainder was released for use in education programs for the prevention of sexual abuse.

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[205] The CAG was entitled to consider the qualifications of the therapist, the prospective benefit of the proposed therapy to the victim, and "any other criteria which the Committee deem[ed] to be reasonable."

6. NEW BRUNSWICK

In December 1992, a former employee of the New Brunswick Training School at Kingsclear, Karl Toft, was convicted of having sexually assaulted a number of former students at the school. This brought to public attention the issue of institutional abuse in New Brunswick. A Commission of Inquiry was subsequently held, and a compensation program established in an attempt to provide redress to those who were victimized while under the care of the Province.

The New Brunswick Training School at Kingsclear was an institution operated by the Ministry of the Solicitor General. It was home to minors who had committed delinquencies, as well as to children who had committed no crimes, but who were wards of the state awaiting placement in foster care.

In 1985, a counsellor at the school reported an incident of sexual molestation involving Mr. Toft and a male student. Toft was transferred as a result of the report, but no other action was taken. A few years later, a colleague and three other male students filed further complaints of sexual assault against Toft. The regional police and the RCMP investigated the complaints, but no charges were laid. Toft was later rehired at the school to work at a summer camp.

Toft was finally arrested in September 1991 and charged with 27 counts of sexual assault. Twelve additional charges were laid in 1992. He ultimately pleaded guilty to 34 counts of sexual assault and was sentenced to 13 years in prison.

Two more individuals have since been convicted of abusing child residents of New Brunswick institutions. Another was charged but not convicted. A fifth has been charged and will be tried in the near future.

On the same date that Toft was sentenced, the New Brunswick Government set up a Commission of Inquiry headed by the Honourable Richard L. Miller, a former Justice of the New Brunswick Court of Queen's Bench. The Inquiry investigated allegations of physical and sexual abuse at three provincial institutions: the New Brunswick Training School at Kingsclear, the Boy's Industrial Home in Saint John and the Dr. William F. Roberts Hospital School.[206] The Boy's Industrial Home was the predecessor institution to the School at Kingsclear. The Roberts Hospital School was a facility operated by the New Brunswick Department of Health for mentally challenged minors and other wards of the state.

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[206] The Miller Report paid special attention to how the Toft case was handled by the authorities.

Mr. Miller released his Report in February 1995. Included amongst his recommendations was one for the creation of a compensation program. In June 1995, the Government responded to this recommendation by establishing the Compensation for Victims of Institutional Sexual Abuse Program.

The stated objective of the program was "to allow for the orderly, appropriate, timely resolution of claims, made against the Province, by persons who indicate they were sexually abused, by employees of the Province" at one of the three institutions examined during the Miller Inquiry. Lawyers from the New Brunswick Department of Justice and those representing the victims had established a process through which settlements could be negotiated. It was hoped that this would provide an opportunity to address legitimate claims outside of the court system.

The program commenced on June 8, 1995. On August 29, 1996, the Department of Justice announced that the Program would end the following day. In a press release, the Minister of Justice, the Honourable Paul Duffie, explained the reasons for the termination:

> [T]his package has been in effect for 15 months, and now I believe that it's time to bring closure to the process ... I believe that at this point, the majority of claims have been filed and are currently being investigated and processed.

Claims received after August 30, 1996, were initially treated as ordinary civil court actions, but on August 19, 1999 the Government re-opened the program and extended the deadline to November 19, 1999. This was done to accommodate claimants who had been unable to file a claim within the initial claim period.[207]

By June 15, 2001, a total of 413 claims had been received. Two hundred and eighty-four of them had been settled, resulting in a payout of $10,159,744.66.

(a) The Process

All persons who had been sexually abused by an employee of the Province at one of the three institutions were eligible for compensation. Physical abuse was not compensable under the program.

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[207] Any claim made under the renewed program was subject to the terms of the New Brunswick *Limitations of Actions Act*, S.N.B., c. L-8. The Government had agreed not to plead limitations in the initial process.

There was no formal organization representing claimants in the process. They were encouraged to retain the services of counsel, but they were free to proceed without one. As it turned out, about 20 different lawyers represented all the claimants. Counsel were not permitted to charge a fee greater than 20% of the total compensation paid to a claimant. Legal fees were paid by the claimants.

Claimants commenced an application for compensation by filling out a statement of claim describing the actions of the alleged perpetrator. This statement was delivered to the Legal Services Branch of the Department of Justice, where it was reviewed by lawyers employed by the Province. Claimants were eligible for benefits when the Government was satisfied it was likely the claimant had suffered the harm alleged.

In order to arrive at an opinion, the Government usually requested authorization to review the contents of the claimant's medical files, psychological reports, young offender files, and the like. A claimant was also asked to consent to the release of all information relating to him or her which was obtained in the course of the investigation and conduct of the Miller Inquiry. None of this information was released to the public.

The claimant was interviewed by a lawyer from the Department of Justice and asked to recount in detail the actions that were committed against him. The Government had the right to ask that the claimant be sworn and the testimony transcribed. The Government could also ask that the claimant be psychologically tested, although no testing could occur without the claimant's consent.

Whenever a name was provided by the claimant, the alleged abuser was contacted by the Government to obtain his or her side of the story. If he or she was still employed by the Province, the relevant department was also contacted.

After reviewing all of the available information, the Government chose whether to accept or reject the claim:

- If it appeared that the claimant did in fact not suffer sexual abuse, as claimed, while in the care of the Province, the claim was refused. The claimant could then decide to either withdraw the claim (and possibly sue the Government instead) or avail himself or herself of the adjudication process described below.

- If it was deemed "likely that harm was done to the claimant," a determination of the severity of the harm was made and an offer, in keeping with the amounts offered to

> other claimants who suffered similar harm, was made to counsel for the claimant.[208] If it was accepted, it was processed as outlined below. If it was not accepted, the amount could be negotiated. If an agreement could not be reached after a reasonable effort at negotiation, the claimant was permitted to refer determination of the award to an arbitrator. Alternatively, the claimant could decide to opt out of the program and proceed with legal action in the normal course.

In the end, only allegations against the five employees who were charged criminally were considered credible by the Government.

As indicated above, in cases where the Government and the claimant did not agree on the veracity of the claim and/or the quantum of damages, the matter could be referred to an independent arbitrator.[209] The procedure for the arbitration hearing was based on the New Brunswick *Arbitration Act* of 1973[210] (although the parties could agree to dispense with some features of the Act). It was an informal proceeding in which the rules of evidence were relaxed. Evidence could be presented by the Province and the claimant, but no witness could be forced to testify. Damages were proven in the same manner as in a civil case.

The arbitrator decided on the veracity of the claim being presented and, if necessary, the quantum of damages. The decision was binding and not subject to appeal. Judicial review could be sought, however, pursuant to the normal rules of court for such matters. In total, 14 cases went to adjudication. Ten were decided in favour of the Province and four were decided in favour of the claimant.

In cases where the Government and claimant agreed on both the veracity of the claim and the quantum of damages, the settlement recommendation was forwarded to various other departments of the Government for approval and verification:

- The recommendation was first sent to a policy advisor at the Department of the Solicitor General. The advisor would examine the facts of the case and determine whether the amount appeared to fall within the guidelines of the compensation program and the normal parameters for claims of a similar nature. If it did, the advisor would forward the recommendation to the Director of Policy Planning and Public Affairs.

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[208] The amount of the offer was based upon an award grid developed by the Solicitor General's office in light of past compensation awards and the nature of the abuse suffered. The grid was never made public.

[209] The same arbitrator was used for all cases to ensure consistency.

[210] R.S.N.B. 1973, c. A-10.

- The Director of Policy Planning and Public Affairs would determine whether the recommendation was "satisfactory." If it was, the Director would order the Director of Financial Services to prepare a cheque for the amount suggested.
- The Director of Financial Services would determine if he was "in accord." If he was, a cheque in the appropriate amount would be prepared and sent to the Department of Justice lawyer in charge of the case.
- The Department of Justice lawyer would examine the cheque and determine if it was satisfactory. If it was, he or she would deliver it to counsel for the claimant.

This multifaceted approval process was not required for damage awards ordered by the arbitrator. Instead, a cheque would simply be issued by the Director of Financial Services and given to counsel for the claimant. In all cases, funds would only be disbursed after the claimant had released the Province from further liability in relation to the claim.

Information received from claimants in the course of the compensation program was not referred to the police. Claimants were told that it was their choice whether or not to go to the police.

(b) Details of the Compensation Package

A variety of financial and non-financial benefits were available under the compensation program. In all cases, however, the total value of compensation (including non-financial benefits) could not exceed $120,000, excluding any costs for counselling.

Validated claimants were eligible for a financial award. This award was normally given in one lump sum payment, but in exceptional circumstances (determined by counsel for the Province) a claimant could be provided with a small interim payment as part of his or her overall settlement. Claimants also had the option of receiving their compensation, in whole or in part, through a structured settlement.[211] Claimants who received awards of less than $50,000 did not have to include the money as income for the purpose of determining eligibility for social assistance.[212]

Financial counselling was offered to assist successful claimants in managing the investment of their awards. The Province established a contact person to facilitate the provision of those services and generally assist the victims with inquiries.

Vocational training was made available through New Brunswick Community Colleges. The Province agreed to pay the $800 fee for tuition and reimburse claimants for the cost of books and materials. In addition, where possible, claimants were given priority for placement in programs of their choice. The usual admission criteria for the programs still applied, but the Province agreed to waive the $100 admission fee for academic upgrading. Claimants could also avail themselves of free assessment and counselling to determine their academic level and to discuss career options and community college programs that might be of interest or benefit.

Claimants were entitled to receive psychological counselling either through Community Mental Health Clinics or private counsellors. This benefit was available to anyone who submitted a claim; eligibility did not depend on validation of the claim. A fund of $5,000 was set up for each claimant. When that amount was exhausted, a claimant could apply to the Director of the Mental Health Commission for an additional year, or $5,000 worth, of counselling. Approval would only be given if the Director received a satisfactory opinion from a private counsellor as to the progress of the claimant which established the need for treatment and set forth an appropriate plan. There was no limit to the number of times that a claimant could apply for additional counselling, but the compensation program policy stated that psychological counselling should be viewed as relatively short-term.

Apologies were not originally part of the program. However, the Minister of Justice later decided to issue apologies on behalf of the Departments of Justice and Solicitor General and the Province of New Brunswick. According to one representative of the Solicitor General, the apologies were extremely helpful for all victims.[213]

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[211] Some claimants who were incarcerated had their lawyers manage the money until their release.

[212] The onus to report income was on the recipient of social assistance benefits. However, when an award exceeding $50,000 was made to a New Brunswick resident, the Department of Justice advised the Human Resources Department of the amount of the award.

[213] Jakubec, A. and C. Loewen, *Summaries of Institutional Abuse Models: New Brunswick's Compensation Summary for Victims of Sexual Abuse* (June 27, 1997), p. 4.

7. NEWFOUNDLAND

Mount Cashel Orphanage was an orphanage in St. John's, Newfoundland. It was run by the Christian Brothers of Ireland and their Canadian counterparts, the Christian Brothers of Ireland in Canada. The Province began placing children who had become wards of the state into the institution in 1966, although it had provided funding to the institution prior to that time.

A number of children were physically and sexually abused while at Mount Cashel. Allegations have been made of incidents of abuse dating from as early as the 1950s to as late as 1982. Several Brothers have been convicted of criminal offences in relation to their conduct at the orphanage. Others are currently facing charges.

The police investigated complaints of abuse at Mount Cashel in the mid-1970s. Two reports were prepared (in 1975 and 1976), but no charges were laid.

In 1989, the Province set up a Royal Commission to inquire into the conduct and outcome of the police investigation, as well as the past and current policies and practices for handling allegations of child abuse. The Honourable Samuel Hughes, Q.C., a former Justice of the Ontario High Court of Justice, was appointed as Commissioner.

Mr. Hughes produced his Report in 1991. Although most of the Report dealt with issues other than compensation, Mr. Hughes did recommend that the Province establish some sort of arbitration scheme whereby victims of abuse could obtain redress for their injuries. The relevant portion of the Report is reproduced, in part, below:

> I have already mentioned that my terms of reference contain no explicit direction as to this commission's mandate on the question of compensating those who make claims against the government as victims of sexual abuse at the hands of persons at Mount Cashel entrusted with their care by the Director of Child Welfare and I was careful not to consider any evidence relevant to the issue. However, Mr. John Harris, acting as counsel for some, if not all, of the alleged sufferers made an eloquent plea in his final argument for recommendations on it. ... After prolonged reflection I am of the opinion that the question becomes relevant under the general authorization to make recommendations for the "furtherance of the administration of justice" and that to ignore it on the grounds that it was once explicitly provided for and subsequently abandoned would not be in the public interest.
>
> Further inducement to make an extended comment and a recommendation on the subject of compensation has been provided by the Minister of Justice who made a public statement suggesting that the principle of compensation might be favourably considered by the government, subject to some qualifications as to a determination of liability by the courts which appeared to postpone any out-of-court assessment of damages to a time perceivably

far in the future. If the mechanism of settlement by arbitration is decided upon the process should be prompt and contrast favourably with proceeding by way of civil litigation. The arbitration should be consensual and based upon the assumption without the admission that the government is liable to the complainants as victims of sexual abuse while wards of the director of child welfare during a designated period, and confined to those who have already made complaints to the police or this commission or both.

It is suggested that submission to arbitration should be voluntary, and that no attempt should be made to make arbitration conditional upon all the claimants submitting to it, but those who do must provide the government with a release of all claims relating to their complaints in consideration of receiving the compensation awarded by arbitration. All claimants submitting to arbitration should be on equal footing including those whose claims would otherwise be statute-barred. Those who reject arbitration and choose to pursue their causes in the courts should not, it is suggested, be given the latter consideration by a government however benevolent which has the interest of taxpayers in mind.

If the government decides to allocate a "global" sum within the confines of which the arbitrator would assess the compensation payable to each claimant, with consequential abatement if the sum set aside proves less than the sum of the individual amounts as at first calculated, such a limitation on assessment would emphasize the *ex gratia* nature of the resulting payments as contrasted with compensation based upon a confession of liability or a finding of such by a court. It is also desirable as being in keeping with normal constitutional practice in estimating expenditures and informing the public through the House Assembly of their place in the public accounts. The course of arbitration should be expeditious, particularly if the arbitrator selected is generally familiar with the evidence before this commission and the nature of the police investigation. To require an arbitrator to begin afresh, viewing all the evidence accumulated over the last eighteen months with an inexperienced staff, would be to ensure substantial delay.

> Recommendation 33:
> That the Government of Newfoundland and Labrador invite all claimants against it for compensation on the grounds of having suffered sexual abuse at the hands of persons entrusted with their care at Mount Cashel Boy's Home and Training School as wards of the Director of Child Welfare pursuant to the provisions of the *Child Welfare Act, 1972* with respect to all complaints made in good faith during a designated period to consensual arbitration, on the assumption, but without an admission, that it is liable to the said claimants.
>
> Recommendation 34:
> The Government of Newfoundland and Labrador set aside a sum of money within which the arbitrator may assess the amounts payable by it to each of the claimants referred to in recommendation 33 submitting to arbitration.
>
> Recommendation 35:
> That the provisions of the *Limitation of Actions (Personal) and Guarantees Act*, R.S.N. 1970, c. 206 as amended be inoperative as against those claimants who submit to arbitration without prejudice to the position of the Government of Newfoundland and Labrador in defending an action in court.

The Government of Newfoundland did not act upon the recommendations of Mr. Hughes. It was facing a number of lawsuits from former residents of Mount Cashel at the time,[214] and it decided to respond to claims through the court system in the traditional manner. More lawsuits were launched against the Government as time went by.

In December 1996, the Government announced that it had reached a settlement with 39 of the civil claimants.[215] Four further claims were settled shortly thereafter. The Christian Brothers of Ireland in Canada were involved in two of the settlements before being ordered to wind up under the *Winding Up and Restructuring Act*.[216] The Government is currently trying to obtain reimbursement for its costs from the Roman Catholic Church.

The process undertaken in Newfoundland to address the claims of child abuse at Mount Cashel cannot truly be characterized as a compensation scheme or program. It is more accurately described as an out-of-court settlement with several individuals who had commenced civil proceedings against the Province. All settlements were negotiated on an individual basis, and no formal process for validation or review was ever established. However, the informal process adopted bore some resemblance to the schemes employed in other provinces, and for that reason is briefly summarized here. Very few details of the settlements have been released to date.

Lawyers for the Government assessed the claims underlying the lawsuits by examining materials that were available from various sources. Testimony given before the Hughes Inquiry and during the criminal trials of the Brothers charged in connection with the abuse was reviewed. RCMP records were examined; the police had investigated 27 complaints in 1975, and had conducted another investigation concurrent with the Hughes Inquiry in 1989. Church and Provincial records were also consulted. The Government often determined that such sources provided enough detail to validate claims.

The size of the financial settlements varied depending on the nature of the abuse suffered. No formal compensation matrix was ever developed, although near the end of the process an informal grid of damages was produced to ensure consistency. In the end, individual settlements ranged from $50,000 to $250,000. Most of the money was awarded for pain and suffering, although some money was designated for counselling and healing.

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[214] The Christian Brothers of Ireland in Canada and the individual alleged perpetrators were also commonly named as defendants in the lawsuits.

[215] The Government refused to consider compensation for individuals abused before 1966, the year when the Province first began to place children at Mount Cashel.

[216] R.S.C. 1985, c. W-11.

The Government provided financial counselling to claimants who desired it. It also negotiated with insurance companies to provide services for payment of awards in structured settlements, the costs of which were borne by the Province. Money awarded in financial settlements was not excluded from income for purposes of determining eligibility for social assistance.

No counselling services were offered to claimants. As indicated above, some of the money awarded was designated for counselling and healing, but the Government had no way of ensuring that this money was used in any particular way. Paying for the costs of counselling was the responsibility of the claimant.

The Roman Catholic Archdiocese of St. John's, facing civil claims for abuse at Mount Cashel and other institutions, established a counselling program for the victims of sexual abuse.[217] The program is still ongoing. Counselling services are extended to anyone who claims to be a victim of sexual abuse, as well as members of his or her family. Travel costs to and from counselling are covered in some circumstances. If an individual is already in therapy and/or wishes to obtain services from a private counsellor or clinic, the Archdiocese will pay for the costs of those services.

The Archdiocese also took other steps in response to the incidents of child abuse. In 1992, it established a Chair in Child Protection at Memorial University, the purpose of which was to institute a program of study into how society deals with child abuse. The Catholic Church has committed $1,000,000 over 10 years to fund the Chair. The Archdiocese also provides approximately $30,000 to $40,000 a year in bursaries for educational upgrading by social workers who work with victims and perpetrators of sexual abuse.

The Government did not provide claimants with any kind of apology. Instead, the Ministe of Justice expressed regret in a statement to the Provincial legislature in December 1996. The Christian Brothers issued an apology to the residents of Mount Cashel Orphanage, and in 1990 former Archbishop A.L. Penney of the Roman Catholic church tendered an apology for the abuse and the pain that it caused.

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[217] It also commissioned its own inquiry into abuse within the Church: Winter, G.A., *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, submitted to the Most Reverend A. L. Penney, D.D., Archbishop of the Archdiocese of St. John's (St. John's, Nfld.: Archdiocese of St. John's, June 1990).

8. BRITISH COLUMBIA

For many years the British Columbia Ministry of Education operated the Jericho Hill School in Vancouver to provide education for deaf children. Prior to 1979, blind children were also enrolled in the school. The school offered classes from kindergarten to grade 12. Students ranged in age from five to 20. Some were day students and some were in residence. Until 1987, many of the students in residence were at the school seven days a week because their parents could not afford to bring them home for weekends. After 1987, the Province paid for transportation home every weekend and major holiday. In 1993, the school was moved to Burnaby, and re-established as a "school within a school" at South Slope Elementary School and Burnaby South Secondary School.

In 1982 and 1987, allegations of sexual abuse of children in residence at Jericho were made during interviews conducted by Ministry of Human Resources and Ministry of Education personnel. Allegations were made of abuse by both staff members and older students at the residence. The Vancouver Police Department was advised of the allegations, but no charges were laid.

By the early 1990s, six lawsuits had been commenced against the provincial Government in connection with alleged sexual abuse at Jericho. A complete investigation into all complaints was undertaken by the police and various Ministries of the Provincial Government in 1992. The investigators ultimately concluded that charges should have been laid in 1982 and 1987.

The Provincial Ombudsman also commenced his own investigation of the alleged abuse in 1992. He published his Report in November 1993, concluding, amongst other things, that abuse had occurred and that a non-confrontational process should be established to determine compensation for the victims.

The Provincial Government responded to the Ombudsman's Report by appointing former British Columbia Supreme Court Justice Thomas Berger, Q.C., as special counsel. Mr. Berger was directed to inquire into allegations of abuse at Jericho and make recommendations as to how the six lawsuits against the Government, and any others that might follow, could be resolved.

In order to complete his task, Mr. Berger was given access to a variety of materials which had been assembled by the Government and police. An arrangement was worked out so that he would be under no obligation to disclose to the Government any evidence he gathered, statements he received, or documents or other materials he obtained. In particular, none of this information was made available to counsel in the branch of the Government responsible for defending against the lawsuits that had been, or might be, filed in connection with alleged sexual abuse at Jericho.

The material reviewed by Mr. Berger included transcripts of interviews with complainants, a summary of a Government data base relating to allegations of sexual abuse at Jericho, and records of interviews with public servants in the Ministries concerned. Mr. Berger also met with a group of therapists who had been treating some of the victims of the sexual abuse. The therapists did not disclose the identities of their clients, but were able to report generally on their clients' experiences at Jericho. Finally, Mr. Berger held meetings with the deaf community and deaf organizations to discuss the history of Jericho, the allegations of sexual abuse generally, the difficulties of language and communication for students at Jericho, and the relationship of those difficulties to the incidence of sexual abuse.

Mr. Berger produced his Report in 1995. He concluded that sometimes widespread sexual abuse had taken place at Jericho. There had been abuse by staff as well as abuse by some older children against younger children. The abuse had taken place over a period of many years, but was most prolific during the period from 1978 to 1987. In 1978, the Province decided to house all the residents, of both genders and all ages, in the same dormitory. Mr. Berger concluded that the Government had been aware of the problems at the school as early as 1982, but had failed to take adequate actions in response. He found that the protective agencies of the state had been unable to adequately address the needs of deaf children. The police and Crown had been unable to communicate with deaf children, let alone assemble their evidence.

Mr. Berger recommended that the Provincial Government accept responsibility for all claims of sexual abuse suffered by students who had attended Jericho Hill School. He also made detailed recommendations as to the form and content of a compensation program.

On June 28, 1995, the then Attorney General of British Columbia, the Honourable Colin Gabelman, acknowledged the allegations of sexual abuse at Jericho as well as the Provincial Government's responsibility to ensure the well-being of children in its care. In response to the recommendations contained in the Berger Report and the Report of the Ombudsman, the Government made a commitment to develop and implement a redress program to assist former students who had been sexually abused while at Jericho. This resulted in the Jericho Individual Compensation Program, which commenced operations in 1996. The program was designed by the Government and was not the result of a negotiated agreement with the victims.

(a) The Process

All deaf, hard of hearing, deaf-blind and blind students of Jericho were eligible to apply for benefits under the compensation program. Compensation was only awarded for pain and suffering from sexual abuse which occurred before December 31, 1992. Physical and emotional abuse (no matter when it occurred) was not compensable under the Program.

A claimant commenced an application for compensation by filling out an application form. The form required the claimant to state in writing that he or she was sexually abused in connection with his or her attendance at Jericho, that the abuse occurred before December 31, 1992, and that the claimant was younger than 19 at the time. It also required the claimant to provide the names of individuals to whom he or she had disclosed the abuse.

All applications were reviewed by a Compensation Panel. The Panel was composed of two hearing lawyers and a deaf-blind therapist, appointed by the Attorney General after consultations with representatives of the deaf community. Together, the Panel members had expertise in the law, sexual abuse issues and the needs of sexual abuse victims, and the needs of deaf and hard of hearing persons. The Terms of Reference of the program also specifically directed the Panel to develop an awareness of 1. the needs of the deaf community and the importance of skilled interpreters for comprehending the claim information of deaf claimants, 2. the cultural differences between deaf and hearing persons, and 3. the needs of deaf-blind, hard of hearing and blind persons.

The onus was on the claimant to establish to the satisfaction of the Compensation Panel that there was a reasonable likelihood that he or she was sexually abused at Jericho. The abuse could have been perpetrated by a school employee or another resident. It also could have occurred on or off site, but it had to have been associated with attendance or residence at the school while the Government was responsible for the claimant's care and custody. Sexual abuse was defined in part as follows:

> Sexual abuse means any sexual exploitation of a child and may include any behaviour of a sexual nature towards a child. Sexual abuse may exist even where there is consent to the sexual behaviour. Sexual activity between children may constitute sexual abuse if the difference in age or power between the children is sufficient that the older or more powerful child is clearly taking advantage of the younger or less powerful child ... Normal affectionate behaviour towards children and normal health or hygiene care are excluded.

The Compensation Panel was directed to operate informally. It would determine whether the abuse occurred and, if so, the appropriate amount of financial compensation. It was anticipated that most claims would be determined on the basis of documentary evidence, although an oral hearing could be held if the claimant desired it, the Panel thought it necessary to decide the claim, or the Panel wished to review additional information from the claimant. Claimants were not permitted to have an advocate appear with them or on their behalf in the application process. Interpreter and intervener services were provided free of charge.[218]

Compensation Consultants were appointed to assist both claimants and the Compensation Panel in the process. The role of the Consultants was described in the Terms of Reference:

> (1) to ensure that the claimant is fully aware of the parameters, procedures and possible outcomes of the claim process, in the context of the other avenues of redress available to a claimant: a civil suit or a criminal injury compensation claim;
>
> (2) if requested by the claimant, to assist the claimant in the preparation and presentation of a compensation claim, by locating, detailing, organizing, transcribing, or otherwise ensuring the completeness and accuracy of a compensation claim;
>
> (3) to ensure that the panel is presented with a sufficiently complete and coherent claim for the purpose of the panel assessing claim validity and the amount of compensation;
>
> (4) to assist the panel in reviewing its decision with the claimant if requested by the claimant.

In order to be able to assist the claimants, each Consultant was fluent in American Sign Language and other modes of communication used by the hearing-impaired, knowledgeable about deaf culture, and knowledgeable and experienced in dealing with sexual abuse and interviewing traumatized individuals.

A claim was assessed on the basis of pre-existing documented information, interviews with the claimant by a Compensation Consultant and, if applicable, the presentation made by the claimant at an oral hearing. Claimants were asked to consent to the release of records from outside sources for review by the Panel, and all such information was treated as confidential. Claimants were also entitled to file any prior statements they gave to the authorities in connection with the alleged abuse and, in appropriate cases, reports from therapists. In cases where the Panel required a report from a therapist to decide a claim, the program would request and pay for it. Alleged perpetrators were not contacted or asked for their side of the story.

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[218] Interveners provided assistance to deaf-blind individuals. Whenever possible, claimants were permitted to choose their interpreters and interveners.

Once a claim was accepted by the Panel, a determination of an appropriate amount of compensation was made. The claimant then had 30 days in which to accept or reject the settlement offer. One thousand dollars was set aside for each claimant to pay an independent lawyer (and interpreter) to review the offer. If the claimant decided to accept the offer, he or she was required to sign a release, waiving any further claims against the Government.

There was no appeal against the decisions of the Compensation Panel concerning the validity of a claim or the amount of compensation. However, the Panel was entitled to review its decisions if the claimant asked for the opportunity to provide new or additional information about the claim.

The deadline for submitting applications was September 30, 1998. Four hundred and five applications were received, although 40 were later withdrawn, leaving 365 to be considered by the Compensation Panel.

(b) Details of the Compensation Package

Individual victims of sexual abuse at Jericho were entitled to a financial award for pain and suffering. As indicated above, the amount of compensation was determined by the Compensation Panel upon review of a claim. The Panel was directed to fix the level of compensation having regard to the nature, extent and impact of the sexual abuse. Relevant considerations in determining the nature and extent of abuse included its duration, frequency and type, and whether it was accompanied by threats, coercion and/or force. The impact of the abuse related to its long-term impact on the claimant's physical and psychological well-being, as evidenced by such things as the presence or absence of psychological dysfunction, physical trauma, alcohol and drug abuse, sexual dysfunction and personal and marital problems. The impact of the abuse on lost vocational or income potential was not compensated.

The program prescribed three tiers of financial compensation, devised in accordance with the recommendation of Mr. Berger and the precedent set by the Grandview program in Ontario:[219]

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[219] The following table is reproduced from Shea, Goldie, *Redress Programs Relating to Institutional Child Abuse in Canada* (October 1999), p.13.

	ABUSE	COMPENSATION AMOUNT
Tier 1	Sexual Abuse	$3000
Tier 2	Serious Sexual Abuse	Up to $25,000
Tier 3	Sexual Abuse - Serious and Prolonged	Up to $60,000

Any compensation for the abuse that a claimant had already received from a lawsuit, an out-of-court settlement, or a Criminal Injury Compensation Program claim was deducted from the compensation awarded under the Jericho program.

Compensation was paid in a lump sum, although it could be placed in trust or paid out by way of annuity through a financial service provider. Any compensation paid to a minor was placed in trust until the claimant had reached the age of 19. No compensation was provided to members of a victim's family.

The compensation was deemed to be an award for pain and suffering, and was therefore exempt from income tax. Further, the Province did not include the compensation in determining eligibility for social assistance.[220]

The program ended on March 31, 2001. Of the 365 applications that were considered by the Panel, 359 were validated. The Panel's offer of compensation was accepted in 344 of those cases, resulting in a total of $12,665,000 compensation paid. The average award was $35,500.[221]

It was anticipated that some successful claimants would require financial advice about the impact of the award on their personal finances, or about maximizing its financial benefits. The program covered the cost of interpreters for meetings with a financial advisor of a claimant's choice. However, the program did not cover the fees of the advisor.

Some claimants had consulted lawyers for the purpose of commencing legal proceedings against the Government in connection with the abuse, or for determining their options in that regard. A successful claimant could have the attendant legal fees paid by the program if they were incurred prior to the time frame for submitting applications under the program. The fees had to be reasonable, and payment had to be recommended by the Compensation Panel. The funds were disbursed once a claimant accepted compensation and signed the release.

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[220] This was not initially an element of the program, but was incorporated at a later date.

[221] There is currently before the British Columbia Supreme Court a class action suit brought against the Province by former residents of Jericho for the abuse they suffered. Some of the members of the class accepted compensation under the Jericho Individual Compensation Program and signed releases waiving any further claim against the Government. It is expected that the validity of the releases will be challenged in the lawsuit.

Each successful claimant received an individual apology from the Government. The apologies were confidential and written in non-legalistic language.

As a form of community compensation, the Government donated $1,000,000 to be used generally for the benefit and advancement of the deaf community throughout the Province. The money is administered by The Deaf Community Trust of British Columbia, an organization whose membership is representative of deaf persons throughout the Province. The Government also constructed new residences for students of the Provincial School for the Deaf.

The Jericho Individual Compensation Program was designed primarily to provide financial compensation to the victims of sexual abuse. However, at the time the program was established the Government also committed itself to continue and enhance a program called the Residential Historical Abuse Program ("RHAP"). This was a program established in 1992 in response to the allegations of sexual abuse at Jericho. It provides counselling and therapy services to any individual who alleges he or she was a victim of sexual abuse while in the care of the Province. To qualify for services, individuals did not have to prove that they were sexually assaulted. They simply had to have attended a provincially-funded residential facility, which was defined to include foster homes, group homes, hospitals and correctional facilities for children and adolescents. RHAP funded up to six counselling sessions per month for qualifying individuals.[222] There was no limit on the amount of time that an individual could participate in the program. The only financial constraint was the program's overall budget.

As many of the alleged Jericho victims who came forward to RHAP were deaf, hard of hearing or deaf-blind, the Government developed a separate program to administer mental health services to them: The Deaf, Hard of Hearing and Deaf-Blind Well-Being Program. The program is available free of charge, and the Province pays for any interpretation services required for the therapy. The program also provides sign language lessons to parents of deaf children and to professionals and staff who work with the deaf.

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[222] Qualifying individuals were initially given a short assessment, and then a treatment plan was prepared. The plan was reviewed and updated every six months.

9. FEDERAL GOVERNMENT

For over a century, Canada had an aboriginal residential school system. It was initially operated solely by religious organizations, but in 1874 the federal Government became involved in order to meet its obligations under the *Indian Act*.[223] The schools were then run jointly until 1969, when the Government assumed full responsibility. It is estimated that over 100,000 children attended the schools over the years in which they were in operation. The last school closed in 1996.

In 1996, the Royal Commission on Aboriginal Peoples ("RCAP") released its Report, entitled *Gathering Strength - Canada's Aboriginal Action Plan*. The Report contained personal accounts from aboriginal people who had suffered from sexual and physical abuse while at residential schools. It also documented the far-reaching impact of the abuse.

In January 1998, as part of its response to the Report, the Government of Canada issued a Statement of Reconciliation. It contained the following expression of regret and apology:

> The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal Government which have contributed to these difficult pages in the history of our relationship together.
>
> .....
>
> To those of you who suffered this tragedy at residential schools, we are deeply sorry. In dealing with the legacies of the Residential School system, the Government of Canada proposes to work with First Nations, Inuit and Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed.

Accompanying this Statement was the announcement of a community healing fund worth $350 million, to be administered by the Aboriginal Healing Foundation. The purpose of the fund is to support community-based healing initiatives to address the legacy of physical and sexual abuse in residential schools. The fund is not used to pay for compensation of individual victims or the costs of litigation respecting abuse claims.

Many individuals have filed lawsuits against the federal Government and other defendants seeking compensation for damages suffered while they were at residential schools.[224] Given the sensitivity of the issues raised by the plaintiffs, the Assembly of First Nations and others asked the Government to explore a range of approaches to resolving claims of abuse in a timely and sensitive manner.

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[223] R.S.C. 1985, c. I-5.

[224] As of March 2001, more than 7,200 individuals had filed civil claims. A number of class and representative actions had also been filed.

In 1999, the Departments of Justice, Health, and Indian and Northern Development engaged in a series of exploratory dialogues with survivors of residential school abuse, aboriginal healers, and aboriginal and church leaders. The dialogues helped to open the lines of communication and assist all of those involved to understand the needs of survivors. Agreement was ultimately reached on a set of principles to guide efforts by the Canadian Government to resolve abuse claims. These principles can be summarized as follows:

- Canada has extensive relationships with the former students, their families and communities which will continue well after any individual claim is dealt with. The processes used and outcomes sought in resolving claims should be mindful of these relationships and strengthen and improve them.

- The residential school caseload should be strategically managed as one file, recognizing the need for an overall strategic approach, regardless of whether the claims are advanced in litigation, in the dispute resolution pilots or in other alternatives to litigation.

- Canada recognizes that a significant number of wrongs did occur. From there, Canada seeks to create a climate for the early, safe, credible and effective resolution of the claims. Canada wants to know who was wronged according to existing civil law standards, and whether Canada has or shares liability. Where Canada does, the goal is not to avoid or minimize it, but to provide appropriate redress.

- It is of utmost importance that those acting for Canada keep in mind the continuing, though often unacknowledged, trauma that childhood sexual abuse creates and the health and safety risks involved when survivors are asked to address the procedural or substantive aspects of their claims. These risks extend to families and communities.

- Reliable validation of individual claims is a key consideration. "Innovative and safe means to this goal should be sought within the overall context of ensuring the integrity of each resolution, and thus the overall credibility of Canada's resolution strategy for these matters. Survivors have been strong supporters of the need for integrity and public credibility as resolutions are achieved."

- Canada should seek outcomes which advance the short- and long-term health prospects of the survivors, their families and their communities.

- The emphasis on safety and on helping to rebuild relationships also applies where Canada resists claims. The approach can be adversarial respecting a specific issue, but should not appear to put Canada into an adversarial relationship with those bringing it forward.

These principles were included in a set of strategic directions provided to counsel for the federal Government in addressing aboriginal residential school cases. The directions also suggest that Canada should be favourably disposed to requests to resolve claims outside of litigation in proceedings which can be designed in collaboration with those using them. The proceedings can include innovative approaches within litigation, such as discovery mechanisms and redress elements already adopted in certain cases.

The directions further indicate that, whatever process is used, a focus on health and safety should remain. In particular, health supports need to be available whenever survivors are asked to tell the story of their abuse, and Canada should seek ways to assist requests for the involvement of support persons or representatives of the survivors' community in any proceeding. Canada should not use technical defences to prevent or discourage abuse allegations from being determined on their merits. Closure for individuals and healing for their families and communities will not be achieved if provable claims are turned away or compromised on a technicality. Canada also has a direct interest in the fairness of the entire process, including the fairness of the fees survivors are charged by their own lawyers. It is not in Canada's interest that a validated survivor be left with a lingering sense of injustice, whatever the cause. It is also important for closure that others with liability for abuse accept their responsibility and provide redress.

The Government has now instituted 12 pilot Dispute Resolution Projects in various communities across Canada to address alleged sexual and physical abuse of aboriginal children in residential schools. A Dispute Resolution Project requires a group of approximately 40-60 complainants willing to proceed on the terms contained in a framework agreement designed by the group (also known as "a Survivor Group") and the Government of Canada. Our review examined two such framework agreements. In summarizing these agreements, I have not identified the communities or complainants' groups to which they relate.

(a) Framework Agreement #1

The first framework agreement states, at the outset, that the Government of Canada acknowledges its role in the development and administration of residential schools and apologizes to those who were physically and sexually abused at the schools. The agreement between the Survivor Group and Canada is intended to resolve claims within a Dispute Resolution Project in a way that is safer for survivors than litigation, that is credible, and that promotes healing.

The agreement provides that compensation is for physical and sexual abuse, although other actions can be compensated if they constitute a recognized cause of action for which Canada is liable in law. Cultural and language loss cannot be compensated as they are not causes of action recognized by the courts. The determination of whether an act of discipline constitutes physical abuse is based on the standards of the day when the discipline took place. The burden of proving a claim is on a balance of probabilities. Canada will not rely on limitation periods to defeat a claim within the Project.

The agreement articulates the need for a holistic process that incorporates credible validation of claims. Validation is to be safe, efficient, flexible, effective, inclusive, credible and fair. The parties are to minimize to the extent possible the number of times a survivor is required to tell his or her story.

Validation is to occur through a fact finding session, wherein a fact finder determines what did or did not occur, based on the survivor's story, the information of other witnesses, the views of the parties, and the relevant documents.

The agreement stipulates that the fact finders must be lawyers. The parties are to jointly select two fact finders, one male and one female. Each survivor will have the choice of telling his or her story before either the male or female fact finder, but not both. The parties are to look for fact finders who demonstrate sensitivity to the aboriginal culture and issues, and who are fair, sensitive, independent, objective, open-minded, and good listeners. The parties are to provide the fact finders with an agreed-upon suggested reading list and are to arrange a workshop for them on aboriginal cultural awareness.

Canada is directed to share relevant documents in its possession, subject to privacy legislation or, where a statement of claim has been filed, pursuant to court rules. The Survivor Group must also share relevant documents in the possession of individual survivors with Canada. Based on the shared documents, the parties will agree to as many facts as possible. Where possible, individual survivors are to provide written statements at least two months prior to their fact finding session in order to expedite the process, allow potential witnesses to be contacted, and permit counsel for both parties and the neutral fact finder to prepare for the hearing.

Survivors will tell their story to, and respond to questions from, the fact finder. Survivors will not have to speak to facts previously agreed to by Canada.

The parties may give the fact finder, in advance, a list of questions they would like the fact finder to ask the individual survivor (or a list of issues they would like to have explored). During the session, counsel for Canada and the individual survivor will approach the fact finder together about additional questions either of them would like the fact finder to ask.

Each survivor can be accompanied at the fact finding session by his or her lawyer, family members or another support person. Canada will have one of its lawyers and a maximum of one other person present, unless the individual survivor agrees that more can attend.

Survivors may arrange for additional witnesses to present information. This information is to be given to Canada at least two weeks before these witnesses will be heard, subject to an agreement to waive this notice period.

Canada may present information to the fact finder through its own witnesses, subject to the same disclosure obligations imposed on the Survivor Group. Agreed-upon experts may also provide their assessment to the fact finder.

Witnesses who are members of the Survivor Group are to be questioned only by the fact finder. Other witnesses may be questioned by counsel for any party. Counsel will not ask leading questions of their own witnesses.

Paragraphs 28 and 29 of the agreement are of particular significance. They provide:

> 28. For the credibility of the validation process, Canada will attempt to contact persons alleged to have committed acts of abuse and they will be given the opportunity to provide their story to the neutral fact finder. For the safety of the survivor, the person will be first advised in writing about the process and in a general way about the allegations. Only if the person decides to participate will more specifics of the allegations be provided.
>
> 29. If the person alleged to have committed acts of abuse decides to tell his or her story to the neutral fact finder, it will be in a different location than where the survivor tells his or her story, and at a later time. The person will be accompanied by legal

> counsel and a support person if her or she chooses and will assume his or her own costs.

All those providing information to the fact finder are to acknowledge the solemnity of the process through oath, affirmation or the holding of an eagle feather. The fact finder will take notes, but the survivor's story will only be recorded if the survivor agrees.

After the fact finding session, the fact finder will prepare a written report. The report is to contain the decision as to what did or did not occur and a non-binding opinion as to the effect of any abuse on the survivor and its impact on the survivor's life.

The parties will then attempt to reach agreement regarding the impact of the abuse through negotiation based on the facts found, and the opinion offered, by the fact finder. The parties will also attempt to reach an agreement regarding the legal significance of the facts. If the parties cannot agree on either issue, they may refer outstanding questions to the fact finder.

The fact finder cannot consider questions concerning the appropriate amount of monetary compensation for validated claims. The parties will attempt to reach an agreement regarding compensation through negotiation. Amounts of compensation are to be based on damage awards from relevant court decisions. Canada will not try to negotiate less than the amount it believes a court would award. If the parties cannot agree, a mediator will be selected to facilitate negotiations based on the facts agreed to by the parties or determined by the fact finder. If the parties cannot agree through mediation, the parties are to meet to consider other options for determining the amount.

The agreement contemplates that Canada will pay a certain percentage of the compensation amount. There are also provisions that contemplate the possibility that Church organizations may ultimately agree to participate. Courts have found that the churches share liability, but the churches have been concerned about the financial burden that settled claims would impose on them. On October 29, 2001, the federal Government announced that it will pay 70% of the compensation negotiated by validated victims of sexual and physical abuse.

A certain percentage of compensation amounts is to be dedicated to the individual survivor's healing. This money can be used for such things as community healing, education, vocational or training programs, counselling, therapy or trauma treatment. The money will be held in trust for the individual survivor in the trust account of the survivor's lawyer. The individual survivor will provide a written plan for the use of the funds to be presented to the Board of Directors of the Survivor Group. In order to respect the principle of survivors having control over their own healing, Canada will not play a role in deciding the purposes for which an individual survivor uses his or her healing funds.

The agreement indicates that the fact finding sessions are to be closed to the public unless the parties agree otherwise. Subject to any legal requirements, all information relating to the process, including any settlement, shall be kept confidential, except where the information discloses abuse of a child who is presently a minor.

The fact finder is to return materials to the survivor or destroy them, once a matter has been settled or the Project ended. Canada's legal requirement to keep documents that come into its possession is articulated, although the Agreement provides that Canada will keep only one copy of certain materials.

Canada is to provide funding to the Survivor Group for survivor participation costs. It will also assume the costs of the process.

(b) Framework Agreement #2

The second framework agreement is similar to the first agreement, but with some significant differences. This agreement refers to "complainants," rather than "survivors." Disclosure is to be exchanged in accordance with the practice in civil actions. Canada is to utilize its resources to locate relevant documentation regarding each complainant and is to provide copies of background historical documentation, including personnel files, student records and policy statements regarding discipline, to the fact finder and all parties. The fact finders are also to be provided with a bibliography of reading materials in relation to the history of residential schools. The oral evidence before the fact finder is to be recorded for use later in the process.

Cash compensation is to be paid in a manner that accords with the complainant's preferences. Consideration is to be given to structured settlements. Canada is to pay 50% of the damages. However, if Canada and a church organization come to an agreement regarding the apportionment of responsibility for claims that would apply to the complainant's case, the complainant may require that Canada pay the portion of damages for which it is responsible under that agreement. The complainant may also require that Canada's apportioned share be adjusted based upon any judicial determinations respecting another residential school that would be binding or highly persuasive on a trial judge hearing an action commenced by the complainant for his or her particular claim. Fifteen percent of settlement proceeds are to be directed to healing and related purposes. The money is to be deposited into a trust fund, administered by a steering committee consisting of representatives of the complainants and Canada.

10. ANALYSIS

The above represent some, but not all, of the approaches taken by governments in Canada to reports of institutional abuse. I do not intend to analyze here the elements of each of these approaches and their respective merits or shortcomings. Instead, in Chapter XVIII of this Report, I refer to elements of these approaches which may be helpful to explain my recommendations. Put simply, there are features of approaches taken in other jurisdictions that commend themselves to me and which I have adopted, in whole or in part.

The approaches taken in other jurisdictions are relevant in another way. They collectively demonstrate the variables that exist in each jurisdiction that compel participants in the design and implementation of a government response to recognize that different situations require different solutions, and that one cannot, therefore, blindly follow what has been done elsewhere. In short, there can be no single template for a government response to reports of institutional abuse. Indeed, the approaches outlined above demonstrate that the Nova Scotia situation differed in some respects from the circumstances which presented themselves elsewhere. For instance, the Nova Scotia Government failed to recognize that the existence of multiple allegations against current employees compelled a different approach to the issue of validation than was taken in Ontario. As well, the Nova Scotia Government failed to recognize that Ontario had taken some measures to safeguard against fraudulent claims that were discarded by Nova Scotia without regard to their rationale.

In summary, an examination of the approaches in other jurisdictions has enabled me both to recognize the shortcomings of the Nova Scotia Program and to craft recommendations for the future.

XVII

Report of the Law Commission of Canada

1. INTRODUCTION

In March 2000, the Law Commission of Canada released a Report entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. In 1997, the federal Minister of Justice, the Honourable Anne McLellan, had requested that the Law Commission prepare "a report on the means for addressing the harm caused by physical and sexual abuse of children in institutions operated, funded or sponsored by government." The Commission was to furnish "governments, and Canadians generally, with an inventory and comparative assessment of approaches available" for providing redress for the adult survivors of institutional abuse.

I have read the 455-page Report, together with a number of research and background papers prepared for the Commission. The Report provides a useful articulation of the effects of child sexual and physical abuse upon survivors, and criteria for evaluating the adequacy of various models or approaches which address institutional abuse. Most important, the strengths and shortcomings of different processes which can address institutional abuse are outlined: the criminal justice system, civil actions, criminal injuries compensation programs, *ex gratia* payments, ombudsman offices, children's advocates and commissions, public inquiries, truth commissions, community initiatives and redress programs. Recommendations respecting each process are also made. The Report identifies fairness to alleged abusers and an appropriate validation process as criteria for evaluating a government's response to reports of institutional abuse. However, its prime focus is on the needs of true victims of abuse and on how various models or approaches may be responsive to those needs.

In the pages that follow, I have summarized in some detail the contents of the Report. It assisted me in framing the issues and in formulating my own recommendations. It also provided a useful analytical framework for evaluating the Nova Scotia Compensation Program as a "redress program."

2. GENERAL OBSERVATIONS BY THE LAW COMMISSION

(a) Why Abuse Occurred

The Law Commission offered some insights into why abuse has occurred at institutions for children. It referred to three critical factors: the vulnerability of the residents, the unquestioned authority of the care givers, and the lack of external oversight.

Children who were placed in institutions generally came from marginalized groups or communities in society (the poor, racial and ethnic minorities), whose very marginalization meant they had neither the financial means nor the political clout to exercise control over their lives. Residents also frequently did not fall within what society considered the norm; they included children with disabilities, orphans, and sometimes even those born outside of marriage. Furthermore, those in youth detention facilities also carried the stigma of a conviction. All this made it easy for officials to discount, disbelieve or deny the children's complaints of the treatment they received.[225]

In contrast, those who ran the institutions often came from groups that were powerful and respected: government, churches and their lay orders. For many, the idea that ministers, deacons, priests, nuns, or members of lay orders could commit acts of physical and sexual child abuse was unthinkable. Even today, to accept the extent of abuse that was perpetrated, and the failure of those in charge to prevent or stop it, is to have one's faith in governments and churches seriously undermined. Many would rather believe the abuse did not occur or, when it did, was wildly exaggerated.

Finally, society adopted a kind of 'out of sight, out of mind' attitude towards children in institutions. External oversight was lacking, allowing the abuse to go unseen and unchecked.

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[225] The Report noted that what was particularly disturbing about youth detention facilities is that many children who were incarcerated in them should never have been incarcerated at all. Minor offences such as truancy were sufficient to land a child in one of these facilities. Girls were often placed there for behaviour that was considered difficult or socially unacceptable. In other words, many children were made to feel like criminals for behaviour that should not have been judged so harshly.

(b) Types of Abuse Suffered

The Commission identified the types of abuse suffered by survivors. Physical and sexual abuse were the most obvious, but they were not the only types. Survivors also endured emotional, psychological, spiritual, racial and cultural abuse. The Commission wrote:

> [S]ome children lived in an atmosphere where they were frequently demeaned and psychologically degraded, and where their upbringing, spiritual practices and culture were scorned and repressed. Some children were exposed to these conditions for years on end. The effects of such suffering can be as enduring as those pf physical and sexual abuse. Minds and spirits can be damaged as deeply as bodies, and in a wide variety of ways.

Insofar as physical abuse was concerned, the Commission commented as follows:

> Determining the point at which physical punishment crosses the line from discipline to abuse is not easy. Reasonable people differ as to whether physical punishment is a necessary disciplinary tool and, if so, what the appropriate amount is, and how it should be administered. Whatever divergent views people may have on the subject of physical discipline, however, one thing should be clear. If physical punishment in an institutional setting is to be tolerated at all, it must be a regulated, moderate, measured form of response, used only to discipline serious behaviour that is in clear breach of an established code of conduct. In theory, this approach to physical punishment has long been official policy.

3. THE APPROACH OF THE LAW COMMISSION

In its approach, the Commission identified and focussed on the needs of those who have suffered abuse as children. It resolved to keep the interests of survivors foremost for three reasons:

> First, the needs of survivors are the necessary starting point for assessing the adequacy of redress. After all, it is they who have suffered harm and they who are best able to articulate that harm. Second, of all the parties involved in allegations of institutional child abuse, survivors have by far the weakest voice. They often lack the resources, the organisation and the expertise to make their case strongly and convincingly. Third, too often the needs of survivors have been seen as incidental to other concerns, such as punishing perpetrators. By focussing on survivors, the Commission hopes to change the way responses to abuse are developed and assessed.

The Commission identified certain recurring themes in the manner in which the needs of survivors are expressed:

> Survivors seek: an acknowledgment of the harm done and accountability for that harm; an apology; access to therapy and to education; financial compensation; some means of memorializing the experiences of children in institutions; and a commitment to raising public awareness of institutional child abuse and preventing its recurrence.

The Commission concluded that two fundamental values should guide any attempt to understand and respond to the needs of survivors:

> First, one must respect survivors and engage them to the fullest extent possible in any redress process. Second, survivors must be given access to information and support so that they can make informed choices about how to deal with their experience of abuse.
>
> .....
>
> Ideally, a process for providing redress should take into account the needs of survivors, their families and their communities in a manner that is fair, fiscally responsible and acceptable to the public.

The Report reflected that a child who is abused in an institution experiences profound powerlessness and isolation. This reinforces the importance of a process that permits them to exercise real choices about what redress options to pursue and about strategic decisions relating to those options. It was said that

> imposing 'solutions' on survivors without consulting them as to their needs or taking account of those needs can be as offensive as refusing to offer redress altogether. In such cases, once again, others who have more power are making important decisions affecting their lives ... Engagement also may mean full consultation on the design and implementation of any programs of redress directed to particular groups of survivors.

The Report concluded that engaging survivors to the fullest extent possible in any approach to redress demonstrates respect for them and acknowledgment that they know what is needed to undo the harm done to them.

Survivors also need to feel that they are given enough information to enable them to understand any available process and to make informed decisions that may be required. The information must be provided by someone who can be trusted. As well, many survivors express the need for support during any process of redress. Their involvement in such processes, whether as witnesses in court proceedings or as applicants in a redress program or otherwise, can be traumatic and compel them to confront daily their abusive past.

The needs of survivors primarily identified by the Commission were:

1. Establishing an historical record; remembrance

Many survivors wish to ensure that their experiences are not forgotten. As a result, some wish to see a memorial created. This need not be a physical structure but, rather, could be a place where survivors record their experiences or those of friends no longer alive to ensure that future generations will know what they endured.

2. Acknowledgment

Many survivors are unable to freely describe their experiences to others. Sometimes, this inability is motivated by fear of disbelief, blame, indifference or annoyance. Of course, this may particularly be so where their earlier complaints were met with denial or minimization. Not surprisingly, many survivors therefore want the abuse and the harm it caused to be publicly acknowledged. The Report stated that acknowledgment is "naming the acts done and admitting that they were wrong." It must have three features: it must be specific and forthright, involving a detailed and candid description of persons, places and acts; it must demonstrate an understanding of the impact or harm caused by the abuse; and it must not shift blame for the abuse onto the survivors.

3. Apology

Some survivors identify receiving an apology as one of the highest priorities. Of course, acknowledgment of the wrong may form a component of an apology. An apology is also said to entail acceptance of responsibility for the wrong; the expression of sincere regret or remorse; assurance that the wrong will not recur; and reparation through concrete measures. The Report noted that, even where the abuse is historically distant, its fallout continues to exist through the intergenerational effects of poor parenting or domestic violence, the low educational levels and diminished life skills of many survivors; and the disproportionate numbers of survivors who spend time in correctional facilities. In this context, an apology "is a step in the healing process, and should be understood as a move towards a better future, rather than as a fruitless hearkening back to an unhappy but unchangeable past."

The Report suggested that the apology should, if at all possible, be based on first-hand knowledge and involve an explicit naming of the harms suffered by an individual or a group. It should be in the form that the person or group desires (e.g., private, personalized, written, public). It should be delivered by the person the recipients believe is the most appropriate one to do so. An apology delivered in a representative capacity is best coming from the highest level. Apologies must be delivered in a timely way, given the passage of time that has already taken place since the abuse occurred. They should be culturally sensitive and otherwise appropriate to the person or group to whom they are addressed. Finally, it is not up to the person delivering the apology to decide what should be the appropriate reaction of the person to whom the apology is offered. A true apology can succeed in shifting the power between the parties, restoring the dignity of the survivor and opening the way to reconciliation.

An acknowledgment and an apology can be made without identifying who actually committed the abuse.

4. Accountability

Some survivors need to see individuals held to account – the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight. This may involve findings of accountability without legal liability. Or this may involve the imposition of liability or punishment. The Report expressed this caution:

> Where the model of accountability without liability is chosen, care must be taken to ensure that clear criteria are used to establish accountability. This is because people falsely or unjustly linked to child abuse will suffer the serious social stigma of those accusations, even if they are never exposed to legal liability.

Some survivors believe that the punishment of abusers is a part of their own healing process.

5. Access to therapy or counselling

Abuse often has profound consequences for survivors. The nature and extent of those consequences depend on many factors. The Report identified the need for two kinds of therapy or counselling: immediate support and long-term support. It said:

> Events sometimes thrust survivors into a direct confrontation with their past for which they may not be ready, as when a police investigator unexpectedly arrives at their doorstep, or when they are called to testify at a criminal trial. In such circumstances, survivors may need access to immediate and ongoing support to deal with the memories triggered by the investigation, by a public inquiry, or by facing an abuser in court and being cross-examined about the abuse. Support is necessary from the moment survivors are drawn into an investigation or inquiry. It cannot await the outcome of a judicial proceeding or the conclusion of negotiations for a compensation package

.....

In addition to these situational needs for therapy, survivors need access to long-term therapy and counselling in order to work through the emotional, psychological and other consequences of child abuse. This need is not necessarily linked to or triggered by any legal proceeding or redress program. It is simply part of the healing that survivors require in order to overcome the harm caused by the abuse.

6. Access to education or training

One demonstrated consequence of institutional abuse is that some children did not receive an adequate education, perhaps because the abuse occurred in the school setting or because those who suffered abuse found it hard to concentrate in class or to study. Many survivors see education as a significant step towards asserting greater control over their lives and overcoming some of the harm caused by the abuse.

7. Financial Compensation

As the Report noted, some descriptions of survivors' needs downplay the importance of financial compensation, emphasizing instead acknowledgment, apology, accountability, therapy and education. However, "money is the way the Canadian legal system compensates people for injuries wrongfully caused by others." As well, money can provide for a range of other needs, such as therapy and education.

A process that involves financial compensation brings with it certain difficulties. It is not easy to establish the right amount of compensation for injuries that cannot be compensated by money in any true sense. Consistency in the amounts awarded to survivors is difficult to achieve. Conversely, attempting to achieve consistency by putting a monetary value on the different kinds or degrees of abuse can dehumanize survivors by subjecting them to formulae or tables for compensation that do not really reflect their unique experiences. Finding the appropriate framework for paying compensation has also proven difficult – whether, for instance, it should be paid as a lump sum or in installments. Survivors also have a need to receive appropriate information and financial counselling about savings and investment options open to them.

8. Prevention and Public Awareness

Many survivors find it important to ensure that they be instrumental in preventing abuse of other children. Active involvement in advocacy, education and other preventive strategies can contribute to an individual's personal healing.

9. Needs of Families

Families can feel guilt, particularly where they have been involved in sending their children to institutions where abuse occurred. Survivors become alienated from their parents. Children who have been physically or sexually abused frequently become abusers themselves. As a result, counselling that extends to family members may fulfill an important need of the families.

10. Needs of Communities

Entire communities may be affected by institutional child abuse. Small or tightly-knit communities are especially vulnerable to the ripple effects of such abuse. They must integrate victims back into a community that may already contain victims who later became offenders. Small or close-knit communities have needs much like those of families.

11. Societal Needs: Prevention and Public Education

Society's primary needs today are for greater public awareness of the risk of abuse that children in out-of-home care face, and for better strategies to prevent this abuse. While Canadians are familiar with the most notorious occurrences of institutional child abuse, they tend to see it as a pathology of the past and the result of the actions of a few 'bad apples,' rather than as a continuing and systemic problem. Public perceptions need to change. Support must be given to education and prevention.

4. CRITERIA FOR ASSESSMENT OF REDRESS OPTIONS

The Commission saw the needs of survivors as the foundation for its assessment of the various approaches to redress. However, it also argued that it is not sufficient to evaluate an approach solely by how well it meets those needs. The Report noted that:

> A key concern is also to find or create appropriate remedies that will promote reconciliation and healing. Other considerations that must be built into the assessment process include equity and procedural fairness for everyone involved in allegations of abuse, as well as public acceptability, fiscal responsibility, and goals of prevention and public education.

The Commission put forward the following as criteria by which various redress options may be assessed:

- **Respect, engagement and informed choice** – does the process respect and engage survivors, as well as offer them comprehensive information about the process itself?
- **Fact-finding** – can the process uncover the facts necessary in order to validate whether abuse took place and what circumstances allowed it to occur?
- **Accountability** – do those administering the process have the authority to hold people and organizations accountable for their actions?
- **Fairness** – is the process fair to survivors as well as all other parties affected by it?
- **Acknowledgment, apology and reconciliation** – does the process provide for acknowledgment, apology and reconciliation where abuse has occurred?
- **Compensation, counselling and education** – can the process address the needs of survivors for financial compensation, counselling and education?
- **Needs of families, communities and peoples** – can the process meet the needs of the families of survivors as well as their communities and peoples?
- **Prevention and public education** – does the process contribute to public awareness and prevention?

5. PRINCIPLES APPLICABLE TO RESPONSES TO INSTITUTIONAL ABUSE

The Report also formulated five general principles to govern the manner in which cases of institutional abuse should be handled. These principles are said to be applicable to all approaches and are addressed to everyone who is involved in attempts to respond to institutional abuse: governments and courts, professional associations and their members, religious organizations, survivors and their families and the groups that represent them, and the public, whose support and understanding are vital to assuring that survivors receive appropriate and adequate redress.

- **Former residents of institutions should have the information they need to make informed decisions about which redress options to participate in.**

Information about redress options needs to be presented in an understandable, comprehensive and impartial manner. Therefore, the information should not be provided by someone who has a personal professional stake in representing these potential plaintiffs in a civil action, who relies on them as witnesses in a criminal prosecution, or who counsels them as private clients in a therapeutic setting. Ideally, existing public agencies that offer services to victims (for example, sexual assault centres) could be used as vehicles for dispensing this information.

- **Former residents need support through the course of any process.**

Survivors confronting a difficult and sometimes traumatic past need proper psychological and emotional support so that their participation in the process does not unduly exacerbate the harm they have already suffered. The public interest in discovering wrongdoing, prosecuting the guilty and validating claims justifies providing this support.

- **Those involved in conducting or administering different processes must have sufficient training to ensure that they understand the circumstances of survivors of institutional child abuse.**

To the extent that officials are able to understand the needs of survivors, they can help reduce the negative impacts of adversarial proceedings or the inquisitorial processes of other types of inquiries and investigations.

- **The response to institutional child abuse must be integrated, coordinated and subject to ongoing assessment and improvement.**

The desire to respond to institutional abuse must be translated into action across the entire range of legal and social services systems. Those involved in providing redress must coordinate their efforts to meet all the needs of survivors. Furthermore, experience with existing approaches to redress must be used to improve those approaches.

- **Every effort must be made to minimize the potential harm of redress processes themselves.**

In view of the pain already suffered by survivors, it is imperative that every process for providing redress or punishing wrongdoers is carefully scrutinized to avoid compounding the harm done. Legal processes must be examined to determine whether existing practices and procedures are unduly prejudicial to survivors for very little gain in the rights of alleged abusers. The specific context of child abuse may lead to the conclusion that the balance of interests may need to be readjusted.

6. RESPONSES TO INSTITUTIONAL ABUSE

The Law Commission examined the relative merits of various existing options for redress according to the foregoing criteria and principles. Its conclusions regarding five of those options are summarized here.

(a) The Criminal Justice Process

The Commission contended that the criminal justice process is well-suited to identifying individual perpetrators of abuse and holding them liable. It is, however, less effective in shedding light on the systemic problems that may have allowed the abuse to occur in the first place. It is also unable to respond to forms of institutional abuse which do not constitute criminal offences.

A criminal trial can be a re-victimizing event for a survivor. Witnesses do not control any aspect of the process, and may not be kept fully informed of its progress and consequences. Furthermore, the process can only provide for a limited range of survivors' needs. It does not promote acknowledgment, apology or reconciliation.

The Commission concluded:

> The criminal justice system seeks to achieve a balance between the rights of the accused and the power of the State. The system requires the cooperation of victims in order to achieve its aims. This cooperation comes at a personal cost to victims, however willing they may be to assist.
>
> Despite the emergence of restorative justice as a way of responding to criminal conduct, the criminal justice process is still essentially adversarial, reactive and punitive. Some changes have been made to facilitate the participation of victims in the process. These include procedural changes relating to the manner in which police investigate, prosecutors involve and prepare victims, and judges conduct trials. But the central goals of the system have not been, and likely will not be, modified in the near future. The criminal justice process offers a good, although narrow, fact-finding capacity, and does produce accountability – at least upon a guilty plea or a conviction.
>
> Fundamentally, the criminal justice system is designed to ensure a fair trial for accused persons and to punish those who have been properly convicted. It does not provide an instrument for victims to exact vengeance or to achieve redress that meets their other needs.

(b) Civil Actions

The Commission's conclusions regarding civil actions were well summarized in its Report:

> The civil litigation process is, in theory, well-suited to meeting most of the needs of survivors, while respecting other concerns such as fairness, responsibility, prevention and public education. It is a public, neutral process initiated by survivors that is consistent with the principles of respect and engagement. The requirement of proof in an adversarial setting promotes, although it does not guarantee, the emergence of all the facts relating to the particular wrongs alleged. This fact-finding capacity is an acknowledged strength of the civil litigation process. A judgment in favour of the plaintiff in a civil action is also an effective means for holding defendants accountable since the judgement and the amount of damages awarded are on the public record.
>
> The procedural rules of the civil justice system ensure that the formal process is fair to all parties. As an adversarial process, however, the civil action is an unlikely forum for the promotion of acknowledgment, apology and reconciliation. It is, of course, quite effective at responding to the financial claims of survivors, but is less suited to meeting their other needs, or the needs of families, communities and peoples. Finally, the public nature of a civil action means that it can serve both a preventive and an educational role.
>
> The principal difficulties with the civil action relate to access to justice issues, and to incidental consequences of the adversarial system. Many survivors do not have the financial resources to mount a successful civil action. Others do not have the emotional resources, or the support systems in place that would enable them to pursue an action successfully without being revictimised. These significant differences in financial and other resources of victims and defendants can lead to a perception that the civil justice process is not entirely fair.
>
> When survivors settle a pending lawsuit or opt into an alternative dispute resolution process, a different evaluation of the civil justice system must be undertaken. The goals of respect, engagement and informed choice will usually be met, although the extent to which the facts are revealed depends on the nature of the process adopted. Since the alternative process will be negotiated, it is likely to be fair to all parties. Whether a form of alternative dispute resolution achieves clear and public accountability depends on the terms of the agreement. These may not speak to acknowledgment, or conversely, may provide for both acknowledgment and apology. The same is true of remedies. The amount of financial compensation is likely to be less in a settlement or alternative process. However, other remedies like therapy and education can be included in the agreement. Finally, alternative dispute resolution processes can serve both a preventive and an educational role if they lead to public settlements or explicit preventive and educational programs.

On the whole, the Commission contended that it is inadequate to address widespread, systemic abuse solely through the criminal process and civil actions brought by individual complainants against government or their alleged abusers. Other forms of redress are also required.

(c) Public Inquiries

The Commission saw both positive and negative aspects to the option of holding public inquiries:

> As recognized by the Royal Commission on Aboriginal Peoples and others, public inquiries have significant potential as a means of investigating the incidence, causes and effects of institutional child abuse. They can examine the past without the restrictions placed on courts. They can commission their own research and listen to survivors in a non-adversarial setting. They can be concerned not only with survivors, but with the effects that the abuse had on families and communities. They can be an effective vehicle for public education.
>
> Public inquiries can be both expensive and time-consuming. These are potential drawbacks to consider when choosing this process to redress historical cases of child abuse. Survivors may feel the money directed to an inquiry would be better spent directly on helping them to heal. They may also be sceptical of a process that could delay the opportunity for individuals to access immediate and more tangible forms of redress. In addition, the inquiry process can be unfair to alleged abusers if care is not taken to protect their rights. Public inquiries are most likely to make their distinctive contributions by holding organisations and governments (not individuals) accountable for abuse, and by raising public awareness about abuse and its prevention.

(d) *Ex Gratia* Payments

Governments may choose to provide voluntary (*ex gratia*) payments as compensation for losses or injuries when they are not legally obligated to do so, but when it is deemed in the public interest to do so. The Commission saw some benefits to such a payment program. Since the process involves no attribution or admission of wrongdoing, fairness to alleged perpetrators is not in question, and issues of legal liability need not be resolved. Once a government decides to establish an *ex gratia* payment program, claimants will usually receive compensation sooner than if they had brought a civil action. The ability to fast-track payments may offer a significant advantage to many aging survivors of institutional child abuse. However, the amount of compensation provided will usually be much less than what could be obtained through a court-ordered award of damages. Furthermore, the option as a whole is quite limited in scope. The primary object of the program is financial compensation, and thus many of the other needs of survivors and their families and communities may not be directly addressed. It is preferable to use such a program in combination with other forms of redress.

(e) Criminal Injuries Compensation Programs

Most provinces have established criminal injuries compensation programs to provide financial compensation to victims of violent or personal crimes. The process is generally intended to be simple, effective, inexpensive and quick. It is also designed to be respectful of victims. However, the Commission noted that such programs have their own drawbacks:

> Although criminal injuries compensation programs reflect a concern for most of the evaluation criteria, they do so at a rudimentary level. Survivors are not engaged in the design of the process, even if its non-adversarial character shows respect for them. The process is voluntary and does not require survivors to give up the right to pursue other options. It permits many facts to be revealed. But the limited scope of inquiry offers little chance to understand systemic problems and the organisational context of abuse. There is a general acknowledgment of wrongdoing but there is little opportunity for achieving accountability, and almost none for apology and reconciliation.
>
> The process is fair to all parties. However, the needs of survivors for counselling and education are not addressed, and the level of compensation itself is quite low. Criminal injuries compensation programs are not designed to meet the needs of families, communities and peoples and have no direct preventive or educational component.

7. REDRESS PROGRAMS

The Commission noted that the features of the different approaches to reports of institutional abuse need not remain forever fixed, particularly when it is acknowledged that each does not address all of the needs of survivors. However, the Minister of Justice's fundamental question to the Commission remained: is there some other approach (or approaches) that would better "address wrongdoing, while affording appropriate remedies, and promoting reconciliation, fairness and healing?"

As the Report noted, "[t]he desire for another type of process to resolve past cases of institutional child abuse has already led to the creation of innovative 'redress programs'." This is the term the Commission chose to describe programs designed specifically to provide financial compensation and complementary non-monetary benefits to survivors and others harmed by institutional child abuse. Governments often sponsor these programs in whole or in part; but the programs do not involve proceedings before the courts or any existing administrative agency.

> [T]hey are ... official responses to the threat of civil liability. They typically find their legal foundation in a governmental policy decision and they need not be formally established by

> legislation. Consequently, these redress programs can be as expansive and innovative as the imagination and resources of their creators allow.
>
> There is no single model or legislative template for the design or administration of redress programs. ... Nevertheless, they all share an overriding goal: to respond to the needs of survivors of institutional child abuse in a way that is more comprehensive, more flexible and less formal than existing legal processes. Every time such a program is contemplated, it is necessary to consider the following basic questions:

Input:	Who will design the program, and how?
Beneficiaries:	Whom will the program serve?
Harms:	For what harms will the program provide redress?
Redress:	What compensation and benefits will be offered?
Validation:	How will claims be validated?
Outreach:	How will the program be made known to potential claimants?
Duration:	How long will it last?
Administration:	Who will administer the program?

> The answers to these questions will determine the credibility, effectiveness and success of any given redress program. More than this, the processes by which these questions are developed and negotiated can make or break a redress program.

The Commission examined a number of existing and contemplated redress programs for dealing with institutional child abuse from across Canada. It suggested that such programs are the official response that can be most effectively designed to meet the complete range of goals identified above:

> A well-designed redress program can be an attractive option both for those seeking redress and for governments and organisations attempting to respond to the harm caused. Those offering the program can avoid the costs of having to defend numerous civil actions (participants in a redress program are usually required to give up their right to sue as a condition of their participation). These organisations are also better able, at least in theory, to manage and control the costs of the compensation and benefits to be awarded. They are usually aware of the number of potential claimants and the aggregate cost of paying these claims. In addition, by seeking a comprehensive settlement, the organisations are in a position to marshal non-financial benefits such as counsellors, therapists and education or training programs more efficiently. Finally, they might genuinely feel that to be proactive in trying to meet the claims of survivors and facilitate healing is simply the right thing to do. Acknowledgment and apology can be as important to those who are wrongdoers (or who employed wrongdoers) as to those who are wronged.
>
> Survivors may also find a redress program to be a desirable option. They may prefer a less adversarial, more rapid process that offers a wider range of benefits, meeting more of their needs. They may wish to avoid both the risk of being disbelieved in a civil action for damages because they are not "good witnesses", and the pain of a second victimisation. In return, they may be willing to give up the potential for a higher monetary award from the court. They may also wish to embark on a program that engages them in its design, that is

inclusive and respectful, that provides an acknowledgment and an apology, and that has a public education and prevention component.

The Commission stated that negotiating a series of focussed redress programs with survivors and their communities should be a preferred, although not exclusive, response to institutional child abuse. They are an effective complement to existing judicial and administrative options.

8. THE OPERATION OF REDRESS PROGRAMS

The Commission examined the details of how redress programs can operate. Their observations are summarized under the various headings below.

(a) Input

It is important to the success of a redress program that it respond to the needs of its intended beneficiaries. The most direct way to do so is to permit the beneficiaries or their chosen representatives to negotiate the terms of the program. In contrast to many other approaches, all features of a redress program are negotiable. This allows for involvement of survivors from the outset. Redress programs which involve survivors or those who represent them to the extent of consultation only do not engage survivors as fully as comprehensive negotiations with those individuals; the program is presented on a take-it-or-leave it basis. A truly responsive redress program can emerge only from a negotiating process that reflects the basic principles of respect, engagement, choice and fairness. Various programs in Ontario, such as those in connection with the Grandview and St. John's/St. Joseph's schools, were established after negotiations with former students.

To ensure that survivors effectively participate in negotiations, it may be necessary to ensure that the cost of obtaining professional assistance is reimbursed, given the disparity of resources between those offering redress and survivors.

(b) Beneficiaries

Benefits may be limited to those who directly suffered abuse or may be available more broadly, for example to witnesses to the abuse, or all former residents, or even beyond the former residents to the survivor's own victims (i.e., those who have suffered directly from the survivor's aggressive or destructive behaviour). The St. John's/St. Joseph's program is an example of a redress program which provided counselling for family members.

(c) Harms

A redress program can be designed to accommodate the fullest range of harms, or only more narrow categories of harm. For example, the Jericho program in British Columbia offered compensation for sexual but not physical abuse. For the non-compensable harms, survivors would have to seek redress through traditional processes.

(d) Range of Benefits

A variety of benefits can be offered as part of a redress program. Money is the most basic one. It is usually intended to compensate for pain and suffering, but it can be extended to cover loss of income and loss of enjoyment of life flowing from the abuse. Usually a program will set a scale of payments that is meant to correspond to the duration and severity of the abuse suffered. The money can be paid either in a lump sum or on a periodic basis.

Some redress programs also offer financial counselling. There may be a need to provide potential beneficiaries with information about the financial advantages and disadvantages of seeking redress through the compensation program as compared to bringing a civil action. This enables survivors to make meaningful choices. Financial counselling is also usually intended to provide survivors with a broad range of services, including assistance in determining whether to take a lump-sum or periodic payment, and in managing and investing the money received.

Other possible benefits tend to address more specific needs of claimants. Therapy is often identified as a primary need. Programs may allocate a specific amount for such services or may undertake to pay a therapist directly. Some programs allow survivors to choose the therapist and the form of therapy they prefer. Others designate those therapists whose services will be remunerated. Frequently there is a ceiling either on the amount allocated to therapy or on the period for which funding will be provided.

Where failure to provide a proper education is identified as a harm suffered, some programs offer to pay for educational counselling, the costs of educational upgrading or vocational training. For example, the Grandview program included vocational and educational training.

Some benefits cannot be measured in dollars. Primary among these is the offering of an apology – an acknowledgment of the harm done and the fact that it was not the fault of the survivor; an expression of regret; and an undertaking to make all possible efforts to prevent such abuse from recurring. This kind of statement, addressed privately to the survivor or publicly to a particular group of survivors (or both), can be a central part of a redress program. The St. John's/St. Joseph's program offered a personal, written apology expressed in terms set out by the survivor. As well, the Archdioceses of Ottawa and Toronto (where the schools were located) published a joint pastoral letter. In the Grandview program each beneficiary was entitled to receive an individual acknowledgment from the Ontario Government in a form to be agreed upon by the individual, the Grandview Survivors' Support Group and the Government, after the conclusion of criminal proceedings. The Attorney General of Ontario also undertook to read out a general acknowledgment in the legislature.

Another benefit sought by many survivors is the recording of their experiences. A recorder is selected and given the task of interviewing survivors about their experiences at the institution in question and about the subsequent course of their lives. The report is then published and distributed to all the survivors, and more broadly, if desired. A recorder's report was produced in connection with the St. John's/St. Joseph's program. A video and booklet were produced as a result of the Grandview Agreement. The experiences at Jericho Hill were the subject of a CBC television documentary. Other forms of recording experiences include 1-800 numbers with answering machines, and mail-in registers for audiotapes. The Commission contended that collecting and archiving survivors' experiences – and making them available to other survivors, researchers and to the general public under conditions agreed to by survivors – is a significant non-monetary benefit that can be incorporated into any redress program.

Redress programs can also provide for memorials. Memorials can serve many functions. They can provoke reflection among the general public. They can symbolize a commitment to preventing harm from recurring. They can acknowledge the harm done to those who are no longer alive. The type of memorial, and conditions for its ongoing maintenance, can be negotiated on a case-by-case basis in each particular redress program.

(e) Level of Benefits

An accurate estimate of the number of potential claimants and the level of benefits to be paid out is an essential element in the design of a redress program. If the estimate is too low, a fiscal crisis for the funding organization can result. If the number is too high, negotiators may be inappropriately discounting their calculations in individual cases, based on an inaccurate assessment of the total impact of a settlement. The Commission noted that estimating the number of claimants is not an easy process. It gave the example of the Nova Scotia Compensation Program, which (as reflected in earlier chapters) was based on an initial estimate of 350 claimants, whereas 1,450 claimants eventually filed applications.

Deciding how much money to allocate to each type of benefit offered, and to each type of harm suffered, will be influenced by the amount of money available for the program as a whole, what types of benefits have priority and how many claimants are anticipated. Financial benefits also need to be calculated in light of the awards likely to be made in civil proceedings. The level of benefits must be attractive enough to cause claimants to opt for the program, rather than launch a civil action, but may reasonably be expected to reflect the lower cost and greater certainty of recovery for claimants under a redress program.

Many programs have been preoccupied with finding appropriate mechanisms to ensure consistency and fairness among claimants, in view of the large number of claims likely to be forthcoming in a short period of time and the desire to deal with these claims quickly and with a minimum of administrative costs. The tendency has been to establish a sliding scale of awards according to a negotiated grid. Both the Jericho and Grandview programs, as well as the Nova Scotia program, employed one. Among the considerations factored into these grids have been: the types of harm to be compensated; the degree of severity of the harm suffered; and the duration of the harm. Each category on the grid is then attributed a corresponding range of monetary compensation. The Commission commented:

> A grid permits those funding a redress program to estimate and to control its total cost. The ranges within each category allow some discretion to adjudicators to tailor their awards to the circumstances of each individual claimant. The premise is that within the established ranges some differentiation of claims to recognise the unique situation of each claimant is possible, but that the cost and time required to establish anew the amount of every claim would be not justifiable given the desire to make compensation available in a timely and efficient manner.

(f) Validation

The Commission began its observations on the procedure for validating claims with the following comments:

> The procedure for determining which claimants are entitled to the compensation and benefits offered is a difficult element to design in a redress program. In order to receive the support of survivors, funders and, ultimately, the public (particularly when compensation is paid

> partly or wholly by the State), a redress program will have to be founded on a process to validate claims that strikes a delicate balance. The process must be sufficiently rigorous that it has credibility with program funders, survivors and the public by minimising the potential for exploitation of the program through fraudulent claims. But it must not put applicants through a procedure that simply duplicates the adversarial and formal legal process of a criminal or civil trial.
>
> Striking this balance is an art, not a science ... [N]o validation process (including those of the civil and criminal justice systems) is, or can be, perfect. This acknowledgment is especially important since there are those who believe that the judicial process is the gold standard and that its procedures for testing the validity of claims should always be used.
>
> How elaborate and demanding the validation process should be may depend on the number of claimants involved; the physical, emotional and psychological capacity of claimants to sustain the procedure; the nature and level of compensation and benefits being offered; the existence of other, independent procedures for confirming the claims; and the amount of time and resources available to devote to the process.
>
> Those offering redress must be careful to design a validation process that is proportionate to the compensation and benefits being offered. For example, if the benefit replicates services available through other government programs, the process may not need to be as rigorous as in cases where monetary awards are being made ... [I]t is essential that the validation process be sufficiently credible that workers at institutions do not have their reputations unfairly impugned. This may even require that they be provided with an opportunity to clear their names should a claimant identify them, even confidentially, as an abuser or a passive but knowing bystander.

The validation process may take a variety of forms. It may be founded exclusively upon a documentary record, i.e., a written application accompanied by supporting documents (as in many criminal injuries compensation board hearings). The supporting documents could include materials such as medical records, school report cards and attendance records, police reports, personnel records, and institutional correspondence.

The more serious and detailed the allegations, the more substantiation may be required. Conversely, where a claim does not rely on a specific allegation (for instance, when it is for the loss of culture and language at a residential school for aboriginal children), only minimal documentation should be necessary. In these types of cases, validation need require nothing more than simply establishing that a claimant attended a particular institution, and for what period of time.

The degree of validation required may also depend on the nature of the benefit being sought. Given that therapy is a general social good, regardless of the reason that the therapy is needed, a validation process for persons only seeking therapy should not be excessive. British Columbia established the Residential Historical Abuse Program in 1992. It provides intensive counselling and therapy to individuals who claim they were sexually abused in a provincially-operated institution or a provincially-supervised form of care, based on a simple application and verification of the person's residency at the time of the disclosed abuse.

A validation process may involve an oral hearing. Such a hearing provides an opportunity for claimants to describe directly in their own words the abuse they suffered and the impact it has had on their lives. For adjudicators, it provides an opportunity to directly assess a claimant's current circumstances and his or her credibility. At an oral hearing, experienced adjudicators are often able to validate claims with a minimum of intrusive questioning.

Redress programs do not generally provide for appeals from decisions to reject a claim. A formal appeal process blurs the distinction between a redress program and a formal court proceeding, and may defeat the goal of resolving claims more rapidly than the court system would allow. Ordinarily, those funding a redress program should have no particular reason to seek a review of any compensation granted, since the validation process is one they themselves created or agreed to in negotiations. Moreover, since the objective of the program is to provide redress, it is more consistent with that objective to err occasionally on the side of over- rather than under-compensating. However, some validation processes provide for a rehearing where new evidence has come to light or a summary reconsideration of the first decision by a panel of other first-instance decision-makers. An appeal procedure should not be designed to let claimants simply choose the forum or the adjudicator they wish.

It is not possible to predict precisely all the contingencies that may arise once survivors come forward with claims. Allowances must be made and flexibility must be built into the program. Furthermore, where a process is poorly designed or administered, or where completely unforeseeable events unfold, funders may be forced to revise the validation or appeal process in midstream. This is unfortunate because it undermines the goodwill that the program may have fostered in survivors. More dangerously, it can harm survivors by casting doubt on the legitimacy of the claims of all those who have already received an award under the flawed program.

Designers of redress programs have generally sought adjudicators whose skills are suited to some aspects of the expected claims. Adjudicators are often chosen from among those with legal training. Therapists may also have an important role, given their understanding of the effects of abuse on survivors. Those experienced in personal injury claims adjudication can also be good choices. Beyond ensuring professional expertise, some programs have tried to ensure that the personal characteristics of adjudicators are likely to ease the stress of the process for applicants. For example, in recognition of the fact that all Grandview claimants were women, all adjudicators were women and one was an aboriginal woman. Sometimes, adjudication is simply carried out by employees of the government that funds the program, but this may lead to a perception of a conflict of interest. Care must be taken to choose adjudicators who also have credibility with program funders and the public, and to design the process by which they are assigned to individual cases in a manner that is fair and impartial. Two- or three-person panels should be preferred because the claims process is non-adversarial in nature and because adjudicators will not normally have the benefit of argument from lawyers to assist them in sifting through the facts.

(g) Outreach

A redress program must provide for effective and comprehensive outreach to former residents of targeted institutions to ensure, as far as possible, that all potential claimants are made aware, in a timely way, of the program and provided with the necessary information to make an informed decision whether to participate. How to contact former residents is a troublesome issue. Attendance records are usually in the hands of the authorities who were in charge of the institution, and they may be somewhat less zealous than survivor groups in seeking out the greatest number of former residents possible. Furthermore, even if accurate attendance records can be obtained, they will give no indication of the present whereabouts of former residents. Some net-casting process must be developed.

Additionally, consideration must be given to contacting former residents in a manner that is least likely to cause harm to them. For example, a letter sent to the former resident's home may be opened by a spouse who may then learn, for the first time, about a hidden aspect of the resident's past. The use of popular media is one way of heightening public awareness of a redress program without directly intruding in the lives of survivors. Advertisements can also be posted in community centres, doctor's offices and post offices.

(h) Duration

Former residents must have adequate time to consider the offer of a redress program and to decide whether they wish to participate. The duration of the period for filing a claim must be realistic given the sensitive nature of the abuse and the importance of this decision. The period for filing claims must take into account the difficulties in contacting former residents. Program deadlines must be administered flexibly. Furthermore, in view of the particular emotional and other challenges facing adult survivors of institutional child abuse, the time period within which to apply for benefits should be relatively lengthy. Out-of-time applicants should not have their claims automatically dismissed without at least a summary inquiry into the reasons for the delay.

(i) Administration

The body funding a redress program often takes primary responsibility for administering it. This may create a perception of a conflict of interest. It also requires survivors to place their trust in the hands of the body that they assert betrayed that trust. These difficulties may be resolved or minimized in a number of ways. Extensive negotiations in establishing the program may build a level of trust. Those involved in the negotiations may remain involved in the administration of the program. Alternatively, an independent body may be created to administer the program (although this has not been tried with any redress program yet).

9. ASSESSING A REDRESS PROGRAM

The Commission assessed the option of redress programs against its own criteria for assessing redress options, outlined above.

(a) Respect, Engagement and Informed Choice

The Commission's first criterion was whether the process respects and engages survivors, and offers them comprehensive information about the process itself. Awareness of the needs and particular sensibilities of survivors should therefore be demonstrably reflected in the design of a redress program and the manner in which it is operated. From a procedural perspective, respect in the design of a redress program can be gauged by answering questions such as these:

- To what extent were former residents involved in the design of the program?
- Was a concerted effort made to inform former residents of the existence of the program and to explain its key points?
- Were resources provided so that survivors could form their own support group to provide input into the development of the program and support each other through the redress process?
- Were the survivors able to consult with those who have been involved in other redress programs, to get an idea of what elements of the program proved successful, and which proved problematic?

From a substantive perspective, the crucial determinants of how well the process respects survivors are:

- Do the benefits offered relate closely to the needs expressed?
- Is the compensation offered proportionate to the harm done?
- Are those conducting the validation process familiar with the particular circumstances of child abuse survivors?
- How are survivors treated throughout the application and validation processes, and in the delivery of benefits?

(b) Fact-finding

The Commission's second criterion was whether the process can uncover the facts necessary to validate whether abuse took place and can determine the circumstances which allowed it to occur. The Commission stated:

> A redress program is meant to be a clear alternative to proceedings before courts. It is intended to focus on helping survivors, without making this help dependent on the complex process of assigning legal fault. Consequently, fact-finding about individual cases is not a primary goal of a redress program, at least not in the precise way that goal is pursued in a civil or criminal action.
>
> Some fact-finding is, however, essential to the validation of a claim for redress. To be credible, a redress program must be able to substantiate the accuracy of the claims submitted.
>
> .....
>
> This type of fact-finding has a very specific and, in a sense, private purpose. Its aim is to verify the legitimacy of the claim of an individual survivor. Once that is done, or once a claim has been accepted, the factual basis on which it has been accepted does not become a matter of public record. Details of individual claims and awards are kept confidential. This is necessary because redress programs are designed to be non-adversarial. This means that the alleged perpetrators of abuse do not have an opportunity to counter the allegations, because the basis for compensation is the evidence of harm done, not the identification of the wrongdoer.

(c) Accountability

The Commission's third criterion was whether those administering the process have the authority to hold people and organizations accountable for their actions. It commented:

> [R]edress programs are not designed to name names and hold specific individuals to account for specific instances of abuse. In fact, redress programs may be seen as a way to set aside the difficult issues involved in assigning individual accountability in favour of providing compensation on a collective basis. In such cases, a redress program reflects a choice by the organisation that administered or funded an institution for children to compensate survivors of abuse at that institution without admitting legal liability or requiring proof of the legal liability of specific perpetrators. Therefore, while the redress program does not assign accountability to individuals as part of its process, its very existence represents a form of institutional accountability.

(d) Fairness

The Commission's fourth criterion was whether the process is fair to survivors as well as to all other parties affected by it. Its comments came in two parts. In its Overview, it stated:

> The fairness of a given redress program will depend largely on the validation process. A redress program should be considered fair to survivors where its validation process is based on objective, consistent and relevant criteria. As long as adjudicators are carefully selected and the validation is agreed upon in advance, the process is also fair to those who fund the program. Employees and former employees of institutions may, however, feel that the private nature of the process and their exclusion from it means that the process is not fair to them.

It later continued its comments:

> A redress program awards compensation and benefits to those whose claims have been validated. Invariably, this validation process is not adversarial. In other words, claimants do not have to personally confront those whom they allege abused them.
>
> The absence of alleged perpetrators from redress programs has caused a concern about the fairness of these programs. Persons associated with the institutions where abuse is alleged to have occurred have protested, in some cases, that their reputations are being undermined through a process which allows them no opportunity to counter the allegations that have been made. To put it simply, they do not have an opportunity to tell their side of the story. How damaging is this to the legitimacy of redress programs?
>
> Redress programs do not balance the interests of all parties in the way that civil and criminal processes do because they do not have the same purpose as those processes. No individual

will be convicted of a crime or ordered to pay damages as a result of a redress program. It is true that redress is based on a claim of wrongdoing, and where that claim alleges physical or sexual abuse, it must be based on an allegation against an individual wrongdoer. That alleged wrongdoer does not then have an opportunity to respond to the allegation.

There is a trade-off, however. The redress program is confidential. The alleged perpetrator does not have an opportunity to reply, but neither is he or she called to account or made legally liable for the wrongs he or she is alleged to have committed.

One may argue that the reputation of those who were employees at these institutions is tarnished by the fact of a redress program. There are two aspects of this concern. First, totally innocent employees may have no way of publicly clearing their names. Second, employees collectively have no way of refuting general allegations. To a large extent, however, this is unavoidable. The reputations of an institution and its former employees are tarnished once widespread allegations of abuse emerge, whether or not there have been criminal convictions or judgements in civil actions. The public judges much more rapidly and harshly than the courts, and does so regardless of the existence of a redress program. Recovering from allegations that may never be proven (or disproven) is a big hurdle for institutions as well as individuals.

The fairness that operates in a redress program is a kind of collective fairness. It says, "harms were done to innocent children – we will provide redress for those harms", without further burdening victims with the rigours of a civil action. In turn, they will accept lesser compensation than that to which they may be entitled under the law. Redress programs should be considered fair when they incorporate a validation process that is based on objective, consistent and relevant criteria. Fairness in our society does not begin and end with the adversarial processes of civil courts.

(e) Acknowledgment, Apology and Reconciliation

The Commission's fifth criterion was whether the process provides for acknowledgment, apology and reconciliation. The establishment of a redress program, funded by those who were responsible for the institution, is in itself a form of institutional accountability and acknowledgment, although the program itself will not point the finger at individual abusers. Redress programs also generally involve an offer of an apology of one kind or another. How well they promote reconciliation may depend upon a number of factors, including the existence of a sincere and mutual desire for reconciliation. A redress program that responds to key survivor needs may pave the path to reconciliation.

(f) Compensation, Counselling and Education

The Commission's sixth criterion was whether the process can address the needs of survivors for financial compensation, counselling and education. Redress programs have the flexibility and scope necessary to respond to these needs. The only constraints on them are the priorities and objectives of the program, the creative and financial resources of those funding the program, and their moral and political will.

(g) Needs of Families, Communities and Peoples

The Commission's seventh criterion was whether the process can meet the needs of the families of survivors as well as their communities and peoples. A redress program can be designed to address the needs of families for the same reasons and within the same constraints as set out above. Furthermore, where an affected community can be defined with some precision, a redress program can offer services like counselling programs to the community as a whole.

(h) Prevention and Public Education

The Commission's final criterion was whether the process contributes to public awareness and prevention. It wrote:

> Redress programs are generally not well-publicised outside the community of former residents for whom they are designed. The validation processes, unlike in criminal and civil trials, are not public events. The individual awards themselves remain confidential, with only the ranges being made public
>
> .....
>
> Redress programs to date have generally not dealt with prevention explicitly. One could say that the mere fact of having a government or other body make the public gesture of acknowledging the harm that was done in an institution for which it was responsible may well lead to measures being taken to prevent a recurrence of such events ... [R]edress programs usually do not have a research and recommendation component. Recommendations on how to avoid a recurrence of abuse emerge, if at all, from the efforts of those who are funded under a community-based benefit included as part of a redress program.

(i) Conclusion

The Commission concluded its assessment with the following comments:

> The Commission views redress programs as only one of several options available to survivors of institutional child abuse. They are not a perfect solution. But given the wide diversity of circumstances and needs of survivors, negotiated redress programs offer the best opportunity to meet these needs while respecting the other goals that any approach to providing redress must pay attention. This said, the situation of different groups of survivors are simply too diverse to be satisfied by any single template for redress programs.
>
> One of the main attractions of redress programs, for all parties, is that they are meant to be more expeditious, less costly (both for claimant and for compensator) and less emotionally difficult for survivors than established legal procedures. Because they can be designed and administered on a case-by-case basis, they have the capacity to respond to a greater range of needs and a wider category of victims than do the civil and criminal justice processes.
>
> To be successful, redress programs must be carefully planned to respond to the particular needs of the survivors they are intended to serve. Equally, they must be fiscally responsible and realistic, particularly where they are funded through the public purse. With the experiences of past redress programs as guides, institutions, governments and survivors should now be a position to fashion responsive and responsible redress programs that can be supported by all affected parties and by the public.

10. RESPONSE TO CRITICISMS OF REDRESS PROGRAMS

The Commission recognized that redress programs are not free from controversy. It pointed to three types of objections: the perception of special treatment, problems of validation, and the additional cost. Near the end of its Report, it responded as follows:

> The Commission wishes to emphasize ... that neither the redress programs it proposes, nor other attempts to negotiate the settlement of civil claims, should be construed as an attempt to create a special system of justice for the survivors of institutional abuse alone. Put more precisely, whenever large numbers of people are harmed in significant ways as a result of the policies, acts or omissions of public authorities or large organisations, the response should not necessarily be restricted to traditional processes
>
> .....
>
> Many people are sceptical of non-judicial redress programs because of their perception that there will be insufficient control over fraudulent claims. It is true that the standard of proof for civil, and especially criminal, trials reduces the likelihood of fraudulent claims or charges to succeed. But there are many other, existing compensation programs that do not require claimants to undergo extensive cross-examination in and adversarial setting. The criminal

injuries compensation process is an example. Those who hear and determine criminal injuries compensation claims have acquired expertise and experience that helps them detect unfounded claims. There is no reason to believe that similar processes for filing and supporting claims, and similar techniques for achieving validation cannot be incorporated into any redress program.

In addition, it must be accepted that just as no judicial process is error-free, no redress program will be error-free. Providing compensation to survivors is a quite different objective from ensuring that no person is ever wrongfully convicted. Given this purpose, it is better to err on the side of making payments to some who may not be entitled to compensation, than to exclude legitimate claimants, or to oblige survivors to go through a re-victimising fact-finding process. In all events, survivors themselves have every interest in ensuring that an appropriate validation mechanism is put into place. It will benefit them in that it will ensure that the legitimacy of the awards is widely accepted, and it will mean that whatever resources are made available in a redress program are not dissipated by the payment of fraudulent claims.

Finally, some people have expressed concern about what they perceive to be the costs of comprehensive negotiated redress programs. It may be true, although the evidence is far from conclusive, that more claimants will come forward to participate in a non-adversarial redress program than would launch a lawsuit against perpetrators and their employers. However, the types of settlements that are usually agreed upon within such programs invariably are somewhat less than the sums that would be awarded as damages by the civil courts. In addition, the cost of litigation will always be substantially higher than the cost of negotiating and administering a comprehensive redress program. After all, defendants who are condemned to pay damages are also required to pay a portion of the plaintiff's legal costs, as well as their own lawyer's fees.

But this is not the real issue. Whatever the monetary cost of negotiating a redress program and providing compensation to those who meet the criteria of eligibility, this cost is small when compared to the cost of not acting. The secondary and ongoing damage – to survivors, to their families and to the community – caused by failing to address harms arising from institutional child abuse is incalculable. In view of this fact, it seems misguided and short-sighted to suggest that redress programs are too costly to undertake.

11. RECOMMENDATIONS

The Commission made a number of recommendations throughout its Report in connection with all the various options for redress. Its recommendations in relation to redress programs are reproduced below, along with some of the Commission's commentary, where helpful. The Commission also made six more general recommendations to frame the way the specific recommendations are read. They are reproduced following the recommendations concerning redress programs.

(a) Recommendations Respecting Redress Programs

- **A redress program should be designed with input from the group it is intended to benefit.**

The most credible form of input is negotiation directly with former residents or their representatives. The circumstances of negotiations should ensure, to the extent possible, that the former residents are on an equal footing with those offering redress. It may also involve funding a survivors' group so that information is disseminated to as many residents as possible, and they are aware of the progress of the negotiation.

- **A redress program should offer compensation and benefits that respond to the full range of survivors' needs.**

- **Redress programs should offer a wider range of benefits than those available through the courts or administrative tribunals.**

The categories of benefits or services which may be offered through a redress program should not be considered closed. Former residents should have the opportunity of receiving those benefits which are best suited to their needs.

- **Family members should be entitled to certain benefits of a redress program.**

- **Best efforts should be made to contact as many former residents as possible to inform them of the redress program in a timely fashion, while respecting their privacy.**

Outreach efforts should protect the privacy of former residents. Initial contact by mail, for example, would be preferable. General outreach (i.e., notices and advertisements) can target settings where survivors are likely to see them. Outreach should be made to the prisons to ensure that former residents serving time in custody are given an equal opportunity to participate in redress programs. The information provided in outreach letters or advertisements should be in clear and accessible language. Verbal outreach (e.g., by radio) is as important as written communication.

- **The claims period should be designed to ensure that the maximum number of claimants has an opportunity to apply.**

Termination of a claims period should only occur with reasonable notice.

- **A redress program must be based on a clear and credible validation process.**

The focus of the validation process should be on establishing what harms were suffered at the institution, the effects of those harms, and the appropriate level of compensation. The standard of proof should be commensurate with the benefits offered. Those determining the validity of claims should be impartial decision makers. Members of adjudication panels should have the appropriate professional background, training or life experience to recognize the harms of institutional child abuse. They should have experience with a compensation process, rather than only a fault-finding process. The onus should be on those organizing the redress program to corroborate, to the extent possible, the experiences recounted by those claiming compensation. All possible sources of corroboration should be canvassed, including institutional archives, school performance and attendance records, contemporaneous medical, social service or police reports, and the verdicts of criminal proceedings, if any.

- **The administration of a redress program should have the confidence of both funders and beneficiaries.**

Where possible, those administering the program should be independent of those funding it.

- **Best practices in redress programs should be assembled by an independent body, such as a university department or research institute, for the benefit of society as a whole, as well as survivors.**

Programs to train survivors or their representatives in the negotiation of redress programs should be established. Those who negotiate on behalf of governments should receive training or have knowledge about the circumstances and effects of institutional child abuse.

- **There should be a place (or places) where those who lived in institutions can record their experiences and where historical materials concerning these institutions can be gathered.**

The recording of experiences could be done in a variety of formats. Procedures should be in place to ensure that no allegations or accusations are made against named or identifiable individuals.

(b) General Recommendations

- **Approaches to providing redress to survivors of institutional child abuse must take the needs of survivors, their families and their communities as a starting point.**
- **Every survivor has unique needs. All attempts to address these needs should be grounded in respect, engagement and informed choice.**
- **The processes of redress should not cause further harm to survivors of institutional child abuse, their families and their communities.**
- **Community initiatives should be promoted as a significant means of redressing institutional child abuse.**
- **Redress programs negotiated with survivors and their communities are the best official response for addressing the full range of their needs while being responsive to concerns of fairness and accountability.**
- **In addition to specific programs designed to meet the needs of survivors, it is crucial to establish programs of public education and to continue to develop and revise protocols and other strategies for prevention.**

In the following chapter, I draw upon the analysis and recommendations of the Law Commission Report in making my own recommendations.

XVIII

Recommendations and Conclusion

INTRODUCTION

The Law Commission of Canada identified certain criteria to be used in assessing the options available to a government to address reports of institutional abuse. It also articulated five general principles that should govern how any reported institutional abuse should be handled. It then examined the relative merits of various existing options according to these criteria and principles. The enumerated needs or interests of true victims of abuse (or "survivors") were regarded to be of foremost importance; they acted as the foundation for the Law Commission's assessment of the approaches to reported institutional abuse. I have found the Law Commission's analysis to be extremely helpful in identifying the needs of survivors and the criteria and principles to be used to examine the merits of various approaches. Indeed, I have referred extensively to this analysis in the pages that follow.

The Law Commission also recognized that considerations other than the needs of survivors must be built into the assessment process: for example, "equity and procedural fairness for everyone involved in allegations of abuse." Of course, I share the Law Commission's view that fairness for all affected parties must be considered in assessing any approach to reported institutional abuse. However, I hold a somewhat different view as to how fairness is to be achieved, particularly for alleged abusers, within a government redress program. As will be developed below, I contemplate a role for alleged abusers that enhances the credibility of a redress program, while remaining compatible with the needs and interests of all affected parties, including true victims of abuse.

Certain additional issues, such as the interplay between the criminal process, disciplinary proceedings, and any redress program are given more importance in my recommendations than they have been given in the Law Commission Report, given their significance to the Nova Scotia situation. I also depart from the Law Commission on some other issues, for example, on the timing of apologies to victims of abuse. These and other points are more fully developed below.

It has been suggested by some Nova Scotia past and current employees that the judicial process, in particular the criminal process, should be utilized to validate claims. They see little or no role for specially designed redress programs in any government response to reports of institutional abuse.

Given the design of the Nova Scotia Compensation Program, it is not surprising that employees have taken that position. However, not all alleged abuse cases, whatever their merits, may be expected to proceed to criminal trial. Suspects may be dead or their whereabouts unknown. There may be legal or constitutional impediments to prosecution, unrelated to the merits of the allegations themselves. A case may not proceed because the available evidence cannot meet the criminal standard of proof beyond a reasonable doubt, which, of course, has no application to civil or administrative proceedings. Further, as developed below, I am satisfied that procedures may be crafted that are less rigorous than judicial or administrative proceedings, but remain fair to affected employees.

Ultimately, I share the Law Commission's view that redress programs, if properly designed and implemented, may appropriately form part of a government response to reported institutional abuse. Indeed, in some circumstances, such redress programs can serve as credible and fair alternatives to traditional litigation. There is also no doubt that a properly designed redress program can sometimes best meet the needs of true victims of abuse.

In formulating recommendations, I must be mindful of the fact, earlier alluded to, that there can be no perfect template for a government response to reports of institutional abuse. Too many variables are operative to enable such a template to be created. Indeed, one of the failings of the Nova Scotia program was that its designers too easily borrowed from the experience in other jurisdictions without sufficient regard for local circumstances. For example, Nova Scotia was confronted with a situation in which a number of current employees were accused of abuse, requiring a finely crafted response that fully accommodated their fairness interests. The Ontario programs, which Nova Scotia borrowed from, albeit imperfectly, did not need to confront the same difficulties – certainly not to the same degree. What this means is that my recommendations are not intended to predetermine a government's response to reports of institutional abuse in every situation, but to guide governments towards creative responses that recognize and address the appropriate considerations.

GENERAL CONSIDERATIONS IN DESIGNING A GOVERNMENT RESPONSE

Certain considerations should figure prominently in designing any government response to reports of physical or sexual abuse allegedly perpetrated by employees upon residents of youth institutions. These general considerations are contained in recommendations 1 to 14. More specific recommendations, that apply these general considerations, then follow. Some of these considerations are drawn from the criteria and principles identified by the Law Commission of Canada. I note here at once that programs that are directed to inter-resident abuse, or remedying wrongs other than physical or sexual abuse, will necessarily have regard to additional or different considerations. For designers of those programs, what follows may be useful only in identifying points of similarity or departure.

1. A government response should respect those who were truly abused, engage them in the creation and implementation of any redress process, and offer them comprehensive information throughout so they can make informed choices about their participation in the process.

This language is largely drawn from the Law Commission's report. As the Law Commission reflected, where government only *consults* victim representatives in the design of a government response, or presents a redress program on a 'take-it-or-leave-it' basis, its approach does not promote the principles of respect, engagement, choice and fairness. These principles require full participation by victim representatives in the design process.

Where a redress program is contemplated, full participation will generally require funding to facilitate the creation of a claimant advocacy group and its involvement in designing and implementing an appropriate program. This reflects the usual lack of resources on the part of claimants. Full participation will also generally require funding of professional assistance for such a group and/or for potential claimants. This may involve the payment of legal fees for multiple lawyers representing claimants in a redress program or, as was done for Grandview claimants, a requirement that claimants obtain independent legal advice, at the government's expense, before agreeing to participate in the program.

2. Where the government response involves monetary compensation for abuse and its effects, any validation process to determine whether, and in what circumstances, abuse occurred, must be credible and fair.

3. Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress.

4. A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must include procedural safeguards to protect against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.

5. A government response should strive to hold those who are responsible for abuse, if it occurred, accountable. Accountability extends to both abusers and those individuals, organizations or governments whose actions or inactions enabled abuse to occur. As noted by the Law Commission, these individuals may include "the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight."

6. A government response should strive to address the full range of needs of those who were truly abused. Those needs – for example, the need to see that perpetrators are held accountable – will often not be exclusive to abuse victims, but coincide with the larger public or societal interest. The needs of abuse victims may be met, for example, by monetary compensation, counselling, education and retraining, medical or dental services, acknowledgments and apologies, and establishing a historical record of the abuse.

7. A government response must recognize and reconcile competing needs and interests. For example, the desirability that those victimized maintain their confidentiality may, at times, conflict with the societal need to prevent future abuse and prosecute the guilty. The desirability that the government adopt a process that does not compound the harm done to abuse victims may compete with the interest in ensuring that individuals are not falsely stigmatized as abusers. Ultimately, an appropriate balance must be struck.

As I earlier noted, the Law Commission identified and focussed on the needs of those who have suffered abuse, resolving to keep their interests foremost. I recognize the concerns that motivated this focus – namely, that any government response is, after all, intended to address the harm they suffered, and the fact that traditionally they have had the weakest voice and their needs subordinated to other concerns, such as punishing perpetrators. That being said, it is important to resist designing a government response that serves their needs virtually to the exclusion of others.

Such a response lacks credibility and, thus, ultimately, may not even well serve true victims of abuse. I later address how this balance should be struck.

8. A government response should strive to address the needs of the families and communities of true victims.

9. A government response, particularly where it involves a validation process, should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing.

10. A government response should be enduring. That is, it should complement what must follow. This means that, where abuse has occurred, the response should contribute to reconciliation and healing. Whether or not abuse has occurred, the response should recognize the need for its institutions to operate safely and effectively in the future. It should promote a healthy environment at the institutions, both for their residents and for those who work there.

There are at least two aspects to this recommendation. A process that further alienates true victims of abuse from their government is unlikely to promote reconciliation and healing. On the other hand, a process that is demonstrably unfair to employees is likely to demoralize current staff and dissuade highly qualified individuals from seeking employment.

11. A government response should strive to prevent abuse from occurring in the future and contribute to public education and awareness.

One of government's highest priorities is to ensure that young people under its control or supervision are protected from ongoing or future abuse.

12. A government response should, itself, be transparent; that is, it should permit the public to understand and evaluate it. Government and its officials should also be accountable for its design and implementation. This means, in part, that elected officials must be fully and accurately informed as to the available options and then provide appropriate direction and input into the design and implementation of such a response.

13. A government response must be fiscally responsible.

14. A government response should build in, from the outset, mechanisms to permit ongoing assessment and improvement. However, a response should be designed to avoid, wherever possible, changes mid-stream that may compound the harm to those affected.

15. A multi-faceted government response must be integrated and coordinated. This means, in part, that government ministries, social or investigative agencies and others should not operate at cross-purposes, unnecessarily duplicate efforts or waste valuable resources.

16. A government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. Of paramount concern is that any government response not interfere with such proceedings. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings.

17. A government response should strive to ensure that individuals who are similarly situated be treated similarly. Generally, there should be consistency in the compensation awarded to similarly situated victims. There should be consistency in the interim measures taken by government respecting alleged abusers who are similarly situated. Put simply, arbitrary distinctions should not be drawn between the treatment of affected parties.

18. A government response should be designed to prevent discriminatory treatment of claimants based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability. Equally important, consideration need be given to how a government response can ensure inclusiveness, respect and engagement of all claimants. Such consideration may extend to many aspects of the government response: for example, consultation or partnership with representative community groups, the selection of program designers, administrators and fact finders, and the formation of claimant advocacy groups or joint advisory or implementation committees.

Many of the considerations contained in recommendations 1 to 18 overlap. For example, where investigative agencies unnecessarily duplicate efforts through the investigation of abuse claims (addressed in recommendation 15), true victims may be repeatedly and unnecessarily compelled to relive their abuse, compounding the impact of that abuse on their lives (contrary to recommendation 9).

INITIAL RESPONSE TO REPORTS OF INSTITUTIONAL ABUSE

19. In general, the initial response by government to reported institutional abuse by an employee on a resident should include:

(a) documentation of the allegation;
(b) absent exceptional circumstances, removal of the alleged abuser from the immediate environment;
(c) relocation of the alleged victim(s) or witness(es), where a credible basis exists for believing that these individuals will otherwise not be secure or protected from employees or fellow residents;
(d) appropriate reporting within the institution and to the Ministry involved;
(e) fulfilment of any statutory reporting requirement;
(f) where the allegation involves criminality, referral to the appropriate law enforcement agency for investigation.

20. Policies, procedures or protocols ("policies") should exist to address all of these matters. As well, such policies should specifically articulate the obligation of all employees to intervene to protect residents from abuse.

21. Such policies should be created in advance rather than at the time of a crisis. They should be developed, where possible, after full consultation with affected parties. Employees should be fully educated and trained as to these policies. Institutions should ensure that residents are familiar with those policies that directly affect them.

Some of these policies already exist in Nova Scotia. My mandate did not extend to a review of each of them. Instead, I have focussed in the following recommendations on areas of particular relevance to the issues raised in the course of my review.

THE INTERIM STATUS OF ALLEGED ABUSERS

22. Such policies should specifically address the status of current employees against whom allegations of abuse have been made, pending a determination as to whether abuse occurred. While the paramount consideration must be the safety and security of current residents, these policies should reflect a consistency of approach, procedural fairness to affected employees, recognition that no findings of abuse have been made, and sensitivity to the impact of allegations upon the affected employees.

23. In this context, 'abuse' includes, but may not be confined to, physical or sexual abuse. However, the term 'abuse' should not be so broadly interpreted as to trivialize its meaning and prevent the effective operation of the institution.

24. Generally, where physical or sexual abuse has been alleged against a current employee, that employee should not continue to work in the immediate environment in which the abuse allegations were made. This approach protects not only the residents, but also affected employees from false accusations.

Such a policy reduces speculation about the truth of each allegation. Thus, each employee, in this respect, is treated equally. This ultimately promotes greater fairness to employees and their families.

25. Depending on the circumstances, removal from the immediate environment may involve re-assignment of the employee to other duties, suspension with pay, or, in limited circumstances,[226] immediate termination. In determining which option to adopt, the government should not act arbitrarily. Similarly situated employees should be dealt with similarly. An employee's reassignment or employment status should generally be revisited upon completion of any police or children's aid society investigation, after any criminal charges are laid, after any criminal case is completed, and upon completion of any internal investigation.

26. Sensitivity to the impact of allegations upon affected employees means, in the least, that allegations be addressed discretely as circumstances permit and, where information pertaining to the allegations is disseminated, that the status of the allegations *as allegations only* be articulated. In particular, appropriate recognition must be given to the stigma visited on an employee by allegations of sexual or physical abuse.

POLICIES RESPECTING INTERNAL INVESTIGATIONS

27. Policies should specifically address how and when internal investigations of current employees are to be conducted and by whom. Such policies, which may be internal or joint policies shared with police, children's aid societies and others, should specifically address the

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[226] For example, where the employee admits the wrongdoing.

interaction between internal and external investigations. Matters that should be addressed include:

- **(a) how an initial report of abuse should be received and recorded;**
- **(b) the relative roles of police, children's aid societies and internal investigators in the investigation of abuse complaints;**
- **(c) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of a resident's or witness' account;**
- **(d) the assignment of investigators with specialized training and skills respecting abuse cases, and where applicable, sexual abuse cases;**
- **(e) the desirability of early videotaping of interviews, subject to limited exceptions;**
- **(f) procedures for videotaping, and retention and access to videotapes;**
- **(g) medical examinations of the resident, where applicable;**
- **(h) the exchange of information between the police, children's aid societies and the applicable institution and/or Ministry;**
- **(i) the status of any internal investigation pending an ongoing children's aid society or police investigation, or criminal charges;**
- **(j) when a support person will be permitted to remain with a resident or witness during interviews;**
- **(k) the manner in which a suspected employee is notified that an allegation has been made against him or her;**
- **(l) at what stage of the investigation should the suspected employee be given an opportunity to address the allegations, and what information should be provided to that employee and/or his or her counsel to enable them to address the allegations.**

THE NATURE AND TIMING OF INTERNAL INVESTIGATIONS

Having outlined the subject matters that should be addressed in government policies, I now wish to set out some of the critical components of such policies. What follows is not intended to be exhaustive, but to simply address issues that figured prominently during my review.

In *Protecting Our Students: A Review to identify and prevent sexual misconduct in Ontario schools*,[227] the Honourable Sydney L. Robins makes a number of important recommendations as to the policies that should govern the investigation of sexual abuse allegations made by students against their teachers in Ontario schools. These recommendations are commendable. Many have equal application to the matter under consideration here. In particular, I have adopted a number of these recommendations, with appropriate amendment, that concern the conduct of internal investigations, employment status pending investigations or charges, and the interplay between internal and external investigations of sexual abuse. In my view, they have great relevance to the problems I have identified in Nova Scotia, particularly as to the interplay between the IIU and RCMP investigations.

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[227] Toronto: Ontario Ministry of the Attorney General, 2000 (hereinafter "Robins").

28. Where criminal abuse is alleged, it should be investigated by the police, together with the local children's aid society, if the allegation falls within the society's mandate. *Generally*, any internal investigation should be deferred, pending conclusion of any ongoing or contemplated police investigation or resolution of any criminal charges.

This recommendation recognizes that the police are generally better situated to investigate allegations of criminal abuse. They have specialized training and skills in this area. Further, they are seen as independent of the applicable Ministry or the institution where abuse allegedly occurred. The criminal investigation may obviate any need to conduct a separate internal investigation. Reliance may often be placed on the fruits of the investigation, or on any resulting criminal prosecution. A concurrent internal investigation may contaminate the criminal investigation through suggestive or otherwise inappropriate or incomplete questioning. It may also compete for relevant documentation and, indeed, may obtain such documents in a way that compromises their subsequent admission in any criminal prosecution. Equally important, the desirability of minimizing trauma to true victims of abuse is potentially undermined by a multiplicity of interviews where individuals are asked to recount and relive their experiences.

In deciding how or when to conduct an internal investigation, consideration must be given to the impact of that decision upon a potential or ongoing criminal investigation or prosecution. Absent exceptional circumstances, a government response should recognize the primacy of a timely, effective and fair criminal investigation. Of course, information sharing should occur, as should ongoing dialogue as to the status of active investigations. However, I am not convinced – and the Nova Scotia experience is somewhat confirmatory – that joint investigations by police and internal investigators will generally be successful.

29. Although an internal investigation should generally be deferred to await the completion of a criminal investigation, the decision by government as to whether an employee should be terminated or otherwise disciplined, and any disciplinary proceedings themselves, should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

30. A full internal investigation of allegations of sexual or physical abuse may be required where:

(a) no criminal investigation or prosecution is initiated;
(b) criminal charges are withdrawn, stayed or dismissed;
(c) further deferral of an internal investigation would irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

31. Any such internal investigation should be conducted by individuals with specialized training and skills respecting abuse cases and, where applicable, sexual abuse cases. This may mean that outside investigators need to be retained to conduct the investigation. Where the allegations are not isolated or raise systemic issues about the institution's conduct, outside investigators may also be desirable to foster independence.

32. Any such internal investigation should be mindful of the desirability of:

(a) avoiding or reducing trauma to a resident or any witness through unnecessary or inappropriate questioning;
(b) drawing upon pre-existing evidence, such as interviews already conducted by the police, where applicable;
(c) respecting the privacy interests of all affected parties, to the extent possible and as not incompatible with any statutory duty to report suspected abuse;
(d) ensuring fairness to any employee against whom a complaint has been made;
(e) ensuring an accurate determination, free from stereotypical notions about abuse, residents or employees.

33. No individuals should be provided with assurances of confidentiality that are incompatible with any statutory obligation to report suspected abuse and that potentially expose others to the risk of abuse in the future. The desire for confidentiality can, of course, be considered in the exercise of discretion as to how and whether further proceedings will be conducted.

34. In reporting and describing alleged abuse, residents should be made to feel that their accounts will not be summarily discounted or minimized because they are residents and their alleged abusers are employees. Employees should be made to feel that complaints will not simply be accepted at face value because they are made by young people.

For the reasons earlier noted, it is generally preferable that an internal investigation be deferred where criminality is alleged. A criminal conviction or a determination by the police that an allegation is false may obviate any need for an internal investigation, or at least any extensive investigation. However, the criminal investigation or prosecution may not resolve the question whether the employee should be terminated or otherwise disciplined. The failure to convict beyond a reasonable doubt is not incompatible with a finding of abuse on the lesser standard of proof required in a disciplinary proceeding. Similarly, a charge may not result in a conviction for reasons unrelated to the merits of the allegations themselves. These and other circumstances may invite an internal investigation and disciplinary proceedings. Such an internal investigation, if it must be conducted, should strive to draw upon work already done and avoid unnecessary, and sometimes traumatizing, re-interviewing of witnesses.

Finally, I wish to note that not every allegation of impropriety is criminal in nature or should be regarded as such. For example, an allegation that a body search was overly invasive may, in some circumstances, raise concerns that a resident was sexually assaulted. However, where the body search was conducted in the presence of others, was done in accordance with documented policies, and was not accompanied by other indicia of criminality, it may more properly be viewed as a complaint as to how body searches should be conducted, rather than an allegation of criminality.

PROTECTING RESIDENTS FROM ABUSE

35. Protecting residents from abuse includes protection from the adverse effects of abuse and of having disclosed that abuse. This means that Government should ensure that abused residents have access to appropriate support persons. An appropriate support person may also foster an environment more conducive to full disclosure. Policies should address both the availability of support persons and of counselling and therapy for those who allegedly were victims of institutional abuse.

As Mr. Robins noted in his Report, policies should not presume that every individual should have a support person present during the interviewing process or that any person chosen by the complainant should be present. There will be situations in which specific support persons will inhibit disclosure or an accurate rendition of events.

In some circumstances, it may be necessary to ensure that residents are provided with access to counselling or therapy at the earliest stages. This issue is further addressed in later recommendations.

AUDITS OF EXISTING POLICIES

36. An audit of existing policies, procedures and protocols represents one appropriate way in which government can ensure that current residents are protected from abuse. The audit should not amount to, or substitute for, an investigation of specific allegations of abuse. It should be conducted by a person with experience and training in the auditing of youth institutions and in best practices concerning policies, procedures and protocols pertaining to abuse and its reporting.

Not every allegation of abuse should trigger an outside audit of existing practices. The totality of circumstances, including the nature and number of the allegations, the alleged offence dates, the involvement already of outside agencies, such as the Ombudsmen's Office, whether systemic or widespread abuse is alleged, and whether it is alleged that the complaint was mishandled or ignored by the authorities, need to be considered in making this determination.

TRADITIONAL LITIGATION AND OTHER ALTERNATIVES

General Observations

I agree, in general, with the Law Commission's analysis of the needs and interests of true victims of abuse and with its conclusions as to the extent to which various options available to government meet those needs. Where institutional abuse is alleged, government must consider its alternative responses. One component of an appropriate government response to reports of institutional abuse will generally include some recognition that true victims of abuse should receive monetary compensation and other benefits for any injury or harm they have endured. Monetary compensation will most frequently take place within the context of a civil action initiated by the alleged victim or within the framework of a program designed specifically to provide such compensation and other benefits to victims of institutional abuse ("a redress program"). The most vexing problem for government is to determine when, if at all, a redress program is an appropriate component of a government response to reported institutional abuse, and how such a program should be designed and implemented.

Consideration of this problem requires (a) an open-minded, stereotype-free approach to issues surrounding reports of institutional abuse, and (b) an accurate understanding of traditional litigation and the available alternatives. In my view, a number of Nova Scotia officials did not approach the issues surrounding institutional abuse in an open-minded, stereotype-free way. Further, these officials had an imperfect understanding of both the flexibility of traditional litigation, and the minimal requirements for a Compensation Program that would be credible, fair, effective and fiscally responsible.

Avoidance of Speculative Myths, Stereotypes and Generalized Assumptions

37. When a government receives reports of institutional abuse, it must approach these reports in an open-minded way. Government must avoid "speculative myths, stereotypes and generalized assumptions"[228] surrounding the credibility of young people, abuse or its victims: for example, notions that young people are inherently unreliable, or that only claims contemporaneously voiced are likely to be true.

38. At the same time, government must not substitute equally untenable assumptions or stereotypes: for example, notions that those who allege abuse almost inevitably were abused, or that traditional indicia of unreliability (such as past criminality) have no relevance to abuse allegations. The perpetuation of myths, stereotypes and assumptions – on either side of the abuse issue – may skew an investigative process and lead to unwarranted conclusions that abuse did or did not occur. Similarly, such perpetuation may prevent government from formulating an objective, open-minded and credible response to reported institutional abuse.

39. Further, government must educate the public to recognize, and avoid, myths, stereotypes and assumptions. Although government must be alert to public opinion, it cannot be swept away by an uninformed public. In this regard, it must lead, not simply follow.

As reflected in my earlier analysis, I am of the view that the Nova Scotia government uncritically assumed that virtually all abuse claims were true. This assumption coloured its approach. It did little to ensure that the public remained open-minded about this issue, pending a determination of the true facts. It was too easily swayed by concerns as to how it would be perceived in the eyes of the public. In fairness, it was caught up in a groundswell of public opinion, fuelled by some media members, and an understandable concern that victims of abuse be seen to be dealt with sensitively.

Credible Validation within Either Traditional Litigation or Redress Programs

More often than not, where institutional abuse is alleged, its existence, or at least its prevalence, is in dispute. Where alleged abusers have been identified, they frequently deny that they committed such abuse and challenge the honesty or the reliability of their accusers. Other times, the alleged abusers may no longer be alive or available, or their position as to whether abuse occurred may not be known. It follows that government is often not well situated – in the absence of a prior judicial or administrative determination – to readily admit that reported abuse was committed by its employees, without some further fact finding or validation process.

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[228] This phrase is taken from the Supreme Court of Canada's judgment in *R. v. Mills*, [1999] 3 S.C.R. 668; 139 C.C.C. (3d) 321.

Fiscal responsibility, a sense of fairness to its former and current employees, and the desirability of not unjustly enriching undeserving claimants, compel government to insist on a credible validation process as a precondition to paying out monetary compensation to abuse claimants. That being said, absent agreed upon facts, credible validation is traditionally found only through litigation, whether criminal, civil or administrative. In particular, civil litigation contemplates that an abuse claimant may initiate an action for damages resulting from the abuse. In Canada, litigation is based on the adversarial system, the theory being that the truth is best advanced through a process that pits one adversary against another.

Here is where government must wrestle with competing interests. On the one hand, credible validation traditionally would be established through adversarial litigation. On the other hand, there is a legitimate concern that true abuse victims not be re-victimized through highly adversarial litigation that would force them to relive their abuse, see their veracity denied and, in some cases, subject them to publicity causing shame, embarrassment and even ridicule. The latter might be of particular concern for those who have put their prior lives as young offenders behind them. Their backgrounds may not even be known to family members or friends. The prospect of a public, and highly adversarial, airing of their claims of abuse could inhibit even the most truthful victim from coming forward. Government has an obvious interest in preventing re-victimization and offering redress to true abuse victims, particularly those who were abused while under its care or supervision.

As I have reflected in earlier chapters, the potential re-victimization of abuse victims represented a legitimate concern that influenced those who designed the Nova Scotia Government's response to reported abuse. It also explains, in part, why the Government chose to adopt an alternative to traditional litigation to address reported institutional abuse.

I earlier found that the Nova Scotia Government fundamentally erred when it designed the Compensation Program by assuming that only an ADR process which excluded employees from meaningful participation, and which sheltered claimants from a critical evaluation of their claims, could accommodate the needs of true victims of abuse. Cabinet was effectively asked to choose between not accommodating victims by forcing them to pursue what was described, erroneously, as traditional litigation, and accommodating victims through an alternative process. To appreciate not only how the Government erred, but also what valid alternatives are available to address reported abuse, one needs to consider the range of mechanisms that may be employed to validate claims.

The most rigorous validation process is to be found within the criminal justice system. Proof of criminality must be established beyond a reasonable doubt. Formal rules of evidence exist that restrict, often to the benefit of the accused, the kind of evidence that can be introduced. That being said, even the criminal justice system has recognized that sexual complainants are often deeply affected by their involvement as witnesses in the criminal process. As a result, judicial and legislative initiatives have accommodated these individuals "in ways which remain consistent with the presumption of innocence and the right of an accused to make full answer and defence."[229] Judges will generally prohibit the publication of the names of sexual complainants or information that might lead to their identification. In exceptional circumstances, the court may exclude all or any members of the public from the court room. Young people may be permitted to testify behind a screen, accompanied by a support person, or may be permitted to adopt a videotape made within a reasonable time after the alleged offence in which he or she described the acts complained of, without necessarily having to detail the allegations orally in court. Significant limitations are placed on the ability of the accused to access confidential records pertaining to complainants or adduce evidence of prior sexual activity engaged in by the complainant.

What is common to these evidentiary and procedural rules is that they appropriately balance the legitimate emotional well-being and privacy interests of complainants with the need to discover the truth in a manner compatible with the presumption of innocence and the accused's right to make full answer and defence. As the Honourable Sydney Robins noted,[230]

> A proper understanding of these rules does not invite undiscriminating acceptance of any witnesses or the relaxation of the standard of proof, but instead, a means to make evidence more accessible to the process. It is not the accused alone who have rights which are to be safeguarded. Child witnesses or sexual complainants must be treated with due regard for their dignity and legitimate privacy interests; the potentially devastating effects of the court process upon them should be recognized; and their evidence (and that of all witnesses) should be evaluated free from speculative myths, stereotypes and generalized assumptions.

Two important points may be drawn from this analysis of the criminal process. First, given the credibility and the rigour of the criminal process, government should not generally compel claimants, whose victimization has been proven in a criminal court room, to re-prove their abuse to obtain redress. Second, the criminal evidentiary and procedural rules are still to be regarded as imperfect in protecting the emotional well-being and privacy interests of true victims of abuse. Because those accused of crimes are subject to conviction and imprisonment, their rights figure prominently, as they should, in the balance drawn between the interests of complainants and accused. As well, the Law Commission noted that witnesses at a criminal trial do not control the process and may not be kept fully informed of its progress and consequences. Accordingly, the criminal process does not meet the full range of needs of true victims of abuse.

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[229] Robins, at p. 223. I am indebted to the Honourable Sydney Robins for his helpful analysis of how witnesses are accommodated in criminal and non-criminal proceedings, which I rely upon heavily in this section of my Report.

[230] Robins, at p. 224

As one moves away from the criminal process and along a continuum that includes civil and administrative litigation, ADR conducted within a litigation framework and a specially designed redress program, protecting the emotional well-being and privacy interests of complainants remains of concern. Such individuals may be harmed and re-victimized by their exposure to these processes as well. However, there are important distinctions to be drawn between criminal and non-criminal proceedings. First, some rules that are necessary to uphold the presumption of innocence in the criminal context may be unnecessary to meet the interests of the opposing party in non-criminal proceedings. Second, in non-criminal proceedings to which the government is a party, government can show sensitivity to the interests of complainants even while testing the veracity of their claims. For example, government may choose, as a matter of policy, to waive what some might say are technical defences – such as limitation periods – that might defeat a determination of whether abuse in fact occurred. Third, once one moves away from criminal and civil court rooms (where the rules are determined by judges and legislatures), the parties may craft their own rules to appropriately balance the interests of affected parties. So, for example, the parties may agree that the fact finding remains confidential, an important component for complainants who would otherwise risk public exposure as former offenders. What is important to remember is that this can be done as part of a specially designed redress program or, indeed, even as part of traditional litigation.

Traditional litigation not only permits the accommodation of witnesses alleging abuse, even within the adversarial process, but contemplates resort to ADR as incidental to the litigation. In other words, on consent, parties can structure, even within traditional litigation, mediation or other ADR processes to resolve some, most or all of the disputed issues in the proceeding. The parties can agree on the rules to govern the ADR process. These rules can, again, accommodate witnesses in a way that is compatible with a number of their needs.

Of course, in some respects, this is what the Nova Scotia Government thought it was doing in designing and implementing the Compensation Program: moving to an ADR process that sensitively served the interests of the complainants and prevented their potential re-victimization through traditional litigation. However, fundamental in any balancing of the interests of both complainants and adverse parties is a recognition that the process must resolve disputed facts in a way that is credible and fair. The *balancing* of interests means that the complainants' interests can be accommodated in important ways, but only to a point that remains consistent with a credible and fair fact finding process.

In our interviews with several persons involved in the design of the Nova Scotia Compensation Program, they made the point that the decision to compensate individual claimants was made without prejudice to the employees implicated as abusers. Indeed, no admissions of liability were made. Settlements and file review decisions were confidential and were not legally binding upon employees. Employees were required to make no financial contribution to the process. They would benefit from the fullest of legal and constitutional protections should they have to defend themselves in criminal or disciplinary hearings. Accordingly, it was said, employees were not prejudiced by the process.

As I earlier noted, there are serious difficulties with the view that employees were not prejudiced by the Nova Scotia response. The compensation of many hundreds of claimants, coupled with a very public apology offered up by Government and the reassignment or suspension of staff, sent a very clear message, particularly in small communities, that the guilt of employees had been determined. Whatever the precise design of a redress or compensation program, it is difficult to contend that staff at the subject institution(s) suffer no prejudice when government agrees to award monetary compensation and non-monetary benefits to many members of the community.

But leaving aside prejudice to employees for a moment, in my view, adoption of a process that does not *credibly* evaluate the legitimacy of individual abuse claims undermines the integrity of the process itself. It violates a government's moral and fiscal responsibility to the public. Arguably, it also violates a government's duty of care towards its own employees.

40. Whether a government responds to reported institutional abuse within a litigation framework or through a special redress program, its response can only be credible if the validation of individual claims is itself credible.

41. Procedures required to validate an abuse allegation in a criminal or civil court room, where liability must be publicly determined, may not be required to validate such an allegation in an ADR process, whether conducted within a litigation framework or as part of a redress program. It is relevant that such a process may involve no binding findings of legal liability, may be confidential, and may not require that the alleged perpetrator contribute to any financial settlement or award. This permits *some* relaxation of the validation procedures, but not at the expense of basic accuracy, as well as fairness to all affected parties.

THE MINIMUM REQUIREMENTS OF A CREDIBLE VALIDATION PROCESS

Where is the balance to be appropriately struck? The following recommendations address this issue. Although the commentary that accompanies them is sometimes framed in terms of a redress program, these recommendations also have application to an ADR process conducted within a framework of traditional litigation.

42. Where serious allegations of sexual or physical abuse have been made,[231] a credible validation process should generally involve, at a minimum, the following:

(a) proof under oath, affirmation or an equivalent;

A requirement that any witness, including a claimant, provide his or her account under oath enhances the credibility of a validation process and is not incompatible with the desirability of accommodating true victims of abuse. Redress programs other than the Nova Scotia Compensation Program have utilized this requirement, without any obvious concern on the part of claimants or their advocacy groups.[232]

(b) the opportunity to challenge the account given by the claimant;

In my view, any validation process that does not permit *some* opportunity to challenge the claimant's account is critically flawed. Traditional litigation requires that this opportunity be afforded through cross-examination by the opposing party or counsel. As I discuss below, given the nature of an ADR process, this requirement may be satisfied by procedures that fall short of traditional cross-examination. For example, the opportunity to challenge the account given by the claimant may be afforded through questioning by the fact finder, accompanied by a full opportunity for opposing counsel to propose suitable questions. This approach, which also finds recognition in some legal systems, has been adopted by the federal Government and certain claimants' groups in pilot projects pertaining to Indian Residential Schools.

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[231] As earlier noted, I need not address claims that are not dependent upon allegations of abuse specific to the claimant, but rather conditions or circumstances applicable to all residents – for example, a claim that residential schools for aboriginal children deprived them of their culture, families and language. If it were determined that such claims are compensable (which I gather is not the position of the federal government), validation would only require proof that the claimant attended the institution for a particular period of time. To be clear, I express no opinion on whether such claims are properly compensable.

[232] Interviews of claimants were conducted under oath beginning in January 1997.

(c) **the opportunity for the parties to tender witnesses and documents supporting or challenging the claimant's account;**

(d) **the obligation for government to consider whether there is available evidence, including that of the alleged abuser, to challenge the claim. Where credible evidence is available, the government must consider tendering that evidence in support of its position. Generally, the alleged abuser should be given the opportunity to provide his or her account;**

It will be recalled that the first pilot project framework agreement pertaining to Indian Residential Schools, described in Chapter XVI, contains an example of this requirement:

> 28. For the credibility of the validation process, Canada will attempt to contact persons alleged to have committed acts of abuse and they will be given the opportunity to provide their story to the neutral fact finder. For the safety of the survivor, the person will be first advised in writing about the process and in a general way about the allegations. Only if the person decides to participate will more specifics of the allegations be provided.

(In New Brunswick, whenever the name of an alleged abuser was provided by the claimant, the named individual was contacted by the Government to obtain his or her side of the story. However, it is unclear to what extent that information affected the process that followed.)

The Law Commission's comments on this issue also bear repeating. In one passage, which addressed the procedures for validating claims, the Commission said this:

> [I]t is essential that the validation process be sufficiently credible that workers at institutions do not have their reputations unfairly impugned. This may even require that they be provided with an opportunity to clear their names should a claimant identify them, even confidentially, as an abuser or a passive but knowing bystander.

However, in another passage, which addressed whether a redress program is fair to those affected, the Law Commission said this:

> The absence of alleged perpetrators from redress programs has caused a concern about the fairness of these programs. Persons associated with the institutions where abuse is alleged to have occurred have protested, in some cases, that their reputations are being undermined through a process which allows them no opportunity to counter the allegations that have been made. To put it simply, they do not have an opportunity to tell their side of the story. How damaging is this to the legitimacy of redress programs?

> Redress programs do not balance the interests of all parties in the way that civil and criminal processes do because they do not have the same purpose as those processes. No individual will be convicted of a crime or ordered to pay damages as a result of redress program. It is true that redress is based on a claim of wrongdoing, and where that claim alleges physical or sexual abuse, it must be based on an allegation against an individual wrongdoer. That alleged wrongdoer does not then have an opportunity to respond to the allegation.
>
> There is a trade-off, however. The redress program is confidential. The alleged perpetrator does not have an opportunity to reply, but neither is he or she called to account or made legally liable for the wrongs he or she is alleged to have committed.
>
> One may argue that the reputation of those who were employees at these institutions is tarnished by the fact of a redress program. There are two aspects of this concern. First, totally innocent employees may have no way of publicly clearing their names. Second, employees collectively have no way of refuting general allegations. To a large extent, however, this is unavoidable. The reputations of an institution and its former employees are tarnished once widespread allegations of abuse emerge, whether or not there have been criminal convictions or judgements in civil actions. The public judges much more rapidly and harshly than the courts, and does so regardless of the existence of a redress program. Recovering from allegations that may never be proven (or disproven) is a big hurdle for institutions as well as individuals.
>
> The fairness that operates in a redress program is a kind of collective fairness. It says, "harms were done to innocent children -- we will provide redress for those harms," without further burdening victims with the rigours of a civil action. In turn, they will accept lesser compensation than that to which they may be entitled under the law. Redress programs should be considered fair when they incorporate a validation process that is based on objective, consistent and relevant criteria. Fairness in our society does not begin and end with the adversarial processes of civil courts.

In my respectful view, it is difficult to reconcile these two passages. If the credibility of a validation process may require that employees be provided with an opportunity to clear their names from unfairly being impugned – a proposition with which I agree – it would seem to follow that a validation process that does not permit the alleged abuser to do so cannot be regarded as fair. I do not accept that the notions that innocent employees are inevitably tarnished or that their damaged reputations may be subsumed within a kind of 'collective fairness' permit a process to be described as fair which provides them with no opportunity to respond. While I agree that fairness does not begin and end with the adversarial processes of civil courts, the point here is that alleged abusers can be given an opportunity to be heard without engaging all of the adversarial processes of civil courts.

It should also be remembered that there are reasons why, in many situations, the alleged abusers will not be heard from in the validation process. They may not wish to be heard, may be deceased or their whereabouts unknown. More importantly, they may have been given an opportunity to be fully heard through criminal or disciplinary proceedings that have already taken place. The results of those proceedings may obviate the need for further validation within an ADR process.

This recommendation places an onus on Government to at least consider whether credible evidence exists to challenge the claim and to further consider whether such evidence should be tendered. It also places an onus on Government to provide the alleged abuser, whether or not Government regards him or her as credible, with an opportunity to be heard.

It is important to remember that a number of claimants involved in the Nova Scotia Compensation Program, with whom I spoke, recognized that alleged abusers should be given an opportunity to be heard during any validation process. They expressed their concern that false or exaggerated claims had tarred them all in the public's mind as frauds or con artists. This sentiment has also been expressed by survivors' groups formed to address alleged abuse in Indian Residential Schools. As reflected in the principles agreed upon between those groups and the federal Government, "survivors have been strong supporters of the need for integrity and public credibility as resolutions are achieved." They understand that a credible and fair validation process ultimately benefits true victims of abuse.

(e) fact finding by one or more independent adjudicators experienced in evaluating credibility and reliability for these or analogous types of claims;

Perceived independence of an adjudicator or fact finder is undermined by a process, as incorporated into the Nova Scotia Memorandum of Understanding, that permits the claimant or government to unilaterally choose the fact finder desired. The perception, accurate or not, is thereby created that the fact finder is not neutral and may be inclined to support the position of the party that chose him or her. Such a process is unlikely to foster public acceptance, nor should it.

That being said, certain cases invite particular expertise or background, so long as independence or impartiality are not compromised. For example, a claim raising issues unique to the aboriginal community may invite involvement of an aboriginal fact finder or, in the least, a fact finder well conversant with such issues. Accordingly, a process can be designed to permit the parties to mutually agree upon a fact finder or a category of fact finders to address a particular kind of claim. The Law Commission noted that, beyond ensuring professional expertise, some programs have tried to ensure that the personal characteristics of fact finders are likely to ease the stress of the process for applicants. For example, in recognition of the fact that all Grandview claimants were women, all fact finders were women and one was an aboriginal woman. At least some of the federal Government's pilot projects contemplate that the claimant can choose the gender, though not the identity, of the fact finders. Again, it must be emphasized that skilled and experienced adjudicators can be sensitive to the needs of claimants in a way that remains compatible with an open-minded and untainted evaluation of credibility and reliability.

(f) an appropriate burden of proof to validate a claim;

Most redress programs adopt the civil standard, namely, the balance of probabilities, with the burden resting on the claimant. The criminal standard of proof beyond a reasonable doubt is unsuited to this process, and would create an undue disincentive for true victims of abuse to resort to the process.

(g) rules for the mutual disclosure of documentation, consistent with the practice in civil actions, or otherwise as may be agreed upon.

There are two components of this requirement. First, there should be provisions for the exchange, in a timely way, of relevant documentation. Second, these provisions should accord with the spirit of jurisprudence and/or existing legislation preventing undue intrusion upon the dignity and legitimate private interests of affected parties. The Nova Scotia program ultimately required claimants to waive confidentiality pertaining to medical and other records, whatever their contents or relevance to the process. In this regard, the Nova Scotia program moved from one end of the spectrum (decision making based on inadequate documentation) to the other.

43. Generally, a validation process should not rely upon a written record only. An oral hearing provides the fact finder(s) with an opportunity to assess the credibility or reliability of the witnesses, including the claimant. It facilitates any challenge to that evidence. As well, as the Law Commission noted, it provides an opportunity for claimants to describe directly in their own words the abuse they allegedly suffered and the impact it had on their lives. This can, itself, have a therapeutic value and contribute to the sense of respect and engagement that should be felt by claimants.

A program may provide that an oral hearing can be dispensed with, where the claimant and the Government consent, and the alleged abuser does not seek an opportunity to be heard. As well, to the extent that programs may provide for hearings to address issues other than the validation of the abuse allegation itself, it will not always be necessary that such hearings be conducted in person.

ACCOMMODATIONS WITHIN A CREDIBLE VALIDATION PROCESS

A validation process cannot guarantee that false or exaggerated claims are not compensated. It cannot be so rigorous and adversarial that it offers no real alternative for a claimant to adversarial litigation. It should accommodate the needs and legitimate privacy interests of true victims of abuse to an extent compatible with basic fairness to other affected parties, most particularly alleged abusers. On the other hand, as the Law Commission stated, it must be sufficiently rigorous that it has credibility with program funders, true victims of abuse and the public, by minimizing the potential for exploitation of the program through fraudulent claims.

I have outlined the minimum requirements of a validation process to ensure its credibility. I now address those accommodations that may be made to claimants, and in some respects to other affected parties, that are compatible with a credible, fair and accurate validation process:

44. A credible, fair and accurate validation process can accommodate the needs and interests of affected parties, including true victims of abuse, in ways that include the following:

(a) it may be conducted in private;

(b) it may provide for the disposition of documents, transcripts and notes following the completion of the validation process;

Examples of such provisions are contained in the Grandview agreement, and in the federal Government pilot project agreements. The interplay between such provisions and freedom of information legislation may arise, and will have to be dealt with. Access to materials generated during the Grandview program became an issue in several criminal proceedings. As well, governments have certain statutory obligations to maintain documents that must be recognized.

(c) it may impose limitations upon access to confidential records, consistent with the principles enunciated by the Supreme Court of Canada in *R. v. O'Connor*[233] and analogous legislation;

Limitations on access to confidential records appropriately exist in criminal and civil proceedings. It is doubtful whether these are properly characterized as 'accommodations' to witnesses.

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[233] [1995] 4 S.C.R. 411; 89 C.C.C. (3d) 109.

(d) it may permit the presence of a support person during the claimant's testimony or at other times during the process;

The *Criminal Code* permits support persons to be present for the testimony of young persons in limited circumstances. There is little reason why an ADR process cannot be even more accommodating in this regard.

(e) it may limit the number of persons attending the fact finding hearing;

For example, federal Government pilot project agreements limit those attending a fact finding session.

(f) it may provide for an informal hearing room and other physical arrangements to minimize the adverse effects of the process;

For example, the Grandview agreement permitted hearings to take place where the claimant was incarcerated or at the claimant's home.

(g) it may limit the right of opposing counsel to cross-examine the claimant, provided that questioning can be directed to the claimant through the fact finder;

Some of the federal Government pilot project agreements provide that the parties may give to the fact finder, in advance, a list of questions they would like the fact finder to ask the individual survivor (or a list of issues they would like to have explored). During the session itself, counsel for Canada and for the alleged survivor may approach the fact finder together to raise additional questions they would like the fact finder to ask. Alleged survivors cannot be cross-examined by counsel.

(h) it may provide for arrangements to prevent a face-to-face encounter between the claimant and the alleged abuser, except where necessary to establish identity;

The *Criminal Code* contains provisions that prevent individuals charged with certain crimes, such as sexual assault, from personally cross-examining the complainant. Counsel may be appointed to conduct the cross-examinations. As well, in specified circumstances, a young person can testify with the benefit of a screen that prevents that person from seeing the accused person. Again, an ADR process can be more accommodating in this regard. For example, one of the federal Government pilot project agreements provides that "if a person alleged to have committed acts of abuse decides to tell his or her story to the neutral fact finder, it will be in a different location than where the survivor tells his or her story, and at a later time." There will be circumstances under which the claimant is content that the alleged abuser is present when the claimant's story is told and, indeed, wishes to be present when the alleged abuser's story is told. It may also be unnecessary to change the location of a fact finding session if the claimant and the alleged abuser appear at different times. Whenever accommodation is made to the interests of claimants, however, government should ensure, where applicable, that alleged abusers are aware of the allegations made against them, so that they are able to respond.

(i) **it may require undertakings signed by participants as to confidentiality, where not inconsistent with statutory obligations;**

The federal Government pilot project agreements contemplate that all information relating to the process, including any settlement, shall be kept confidential, except where the information discloses abuse of a child who is presently a minor. This provision is obviously intended to address the statutory obligation to report suspected child abuse.

(j) **it may provide for evidence to be taken by video-conferencing or other comparable means;**

(k) **it may allow claimants or analogous witnesses to adopt prior videotaped statements as their account, thereby reducing the need to fully recount their alleged victimization.**

Again, the *Criminal Code* provides that, under limited circumstances, a young person may adopt a prior videotaped statement. This does not foreclose cross-examination, but obviates the need to fully recount sensitive events in examination in chief. The accommodation described above is more generous to claimants. Preconditions imposed under the *Criminal Code* would disqualify many claimants from the application of the provisions, by reason of their age or the circumstances under which the videotapes were taken. An ADR process can be more accommodating in this regard.

(l) **it may establish rules to encourage timely admissions of fact, and excuse witnesses from having to recount facts that have been agreed upon.**

For example, federal Government pilot project agreements establish such rules.

PRIOR VALIDATION OF ABUSE

45. Credible validation may be established through findings made in judicial proceedings or administrative hearings to which the alleged abuser was a party.

46. Where a trial judge has found in a criminal case that the complainant or other witness at trial has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded. Such findings may be found in reasons for conviction or sentence or may be implicit in the verdict rendered.

47. Where a finding that the complainant has been abused by a government employee is implicit in a jury's verdict of guilt in a criminal case, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

48. Where an adjudicator has determined, on a balance of probabilities, that the complainant or a witness has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.

49. Absent exceptional circumstances, such as the availability of fresh evidence that casts serious doubt upon the earlier findings of fact, government should not compel such complainants or witnesses to re-prove their own victimization for the purpose of obtaining compensation or other redress.

50. Where prior judicial or administrative findings obviate the need for further validation, government should strive to resolve outstanding issues in a way that does not compound the impact of abuse upon the complainants or witnesses. Non-adversarial means should be resorted to wherever possible.

I considered, and ultimately did not adopt, the position that prior judicial or administrative findings can only be utilized to obviate the need for further validation when any appeals or judicial reviews that could disturb those findings have been finally disposed of. Although the lack of finality of judicial or administrative proceedings can properly be considered, I do not regard it appropriate, as an inflexible or even a presumptive rule, that findings may only be resorted to once all appeals or reviews have been concluded. An appropriate balance of competing interests, including the desirability that validation proceed in a timely way, generally favours an approach that does not defer use of such findings until all appellate proceedings – which can themselves be very lengthy – have been exhausted.

LOWER VALIDATION REQUIREMENTS

Once Abuse Has Been Validated

51. (1) The validation requirements, earlier outlined, pertain to proof of the abuse alleged. Once abuse has been validated, an ADR process can be designed to facilitate the determination of what impact that abuse had, and what benefits should be conferred upon, the validated claimant.

(2) Given the diminished interest that employees have in these determinations, as opposed to a determination whether abuse occurred, a program is entitled to design a process that better accommodates a validated claimant, and further minimizes any potential harm from the process itself.

Once the nature and extent of abuse itself has been determined, then the extent of injury, harm or loss ("the impact") must also be determined, as must the benefits, monetary and otherwise, that should flow from those findings. There is an infinite variety of ways that the impact of abuse on an individual claimant, as well as the appropriate benefits, can be determined. My review of the government programs outside of Nova Scotia reveal some of these approaches.

The fact finder can be charged with the responsibility of making these determinations. Alternatively, the fact finder can make some of these determinations only, leaving the balance to be resolved through mediation or an implementation or advisory committee.

For example, for Grandview, the Eligibility and Implementation Committee was established to oversee and superintend the implementation of the benefits package. This committee was composed of claimant and government representatives, together with a jointly appointed chair.

Other programs also established committees to address various non-monetary benefits. The federal Government pilot project agreements contemplate that the fact finders will only determine what abuse, if any, did or did not occur, and then provide a non-binding opinion on the effect of any abuse on the survivor and its impact on the survivor's life. The legal significance of the findings will only be decided by the fact finders if the parties are unable to agree. The fact finders do not determine the appropriate amount of monetary compensation. That is to be resolved through negotiation, then mediation, if necessary. If mediation is unsuccessful, the parties are to meet to determine other options.

A program may also facilitate these determinations in a variety of ways. For example, a compensation grid may establish a range of monetary compensation based not only upon the type, severity and duration of abuse, but upon the types of impact identified. Or, the program may specify the types of materials, such as psychiatric, psychological or medical reports, that may be relied upon to support these determinations.

Two points are significant here. First, redress should be based not only upon the acts of abuse perpetrated on a claimant, but also upon the specific impact of that abuse on the individual claimant. Second, once abuse is validated, a process can be designed to facilitate the determinations that then have to be made in ways that are even more solicitous of the needs and interests of validated claimants. Not only are concerns about false or exaggerated claims less significant, but individuals found to be abusers have little or no remaining interest in these determinations that engage fairness concerns.

I should also point out, as I later recommend, that lower validation requirements will be adequate for certain non-monetary benefits, such as interim counselling, even for claimants whose abuse has not been validated.[234]

Where Allegations Do Not Involve Criminality

52. Where allegations involve non-criminal conduct or conduct regarded as acceptable when it occurred, validation may be less important, since the prejudice to those against whom these allegations are made is less palpable.

Where Counselling or Therapy is Sought

53. Interim counselling may be provided immediately to claimants, without true validation of the merits of their claims.

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[234] This contemplates two scenarios: interim non-monetary benefits pending validation of abuse, or certain non-monetary benefits being conferred without any necessity of validation. This does not contemplate non-monetary benefits for individuals whose abuse claims were submitted for validation and rejected.

Counselling may be directed not only to the effects of abuse, but also to providing appropriate psychological and emotional support for participation in an ADR process. It follows that insistence upon complete validation as a precondition to such counselling would be self-defeating and prevent some true victims of abuse from participating in the process. Indeed, the need for counselling for some true victims of abuse may be pressing. Further, as the Law Commission noted, counselling is a general social good, regardless of the reason that it is needed, and it often replicates services available through other government programs. Accordingly, claimants are unlikely to be regarded as being unjustly enriched by obtaining counselling without adequate validation.

A program may provide that something short of validation is necessary to obtain interim counselling. For example, the Grandview agreement provided that an application for counselling was to be accompanied by a treatment plan by an experienced therapist, supporting the claimant's position that her experiences at Grandview likely caused or contributed to her present circumstances and that counselling was needed. Alternatively, an applicant could request an assessment by a government-approved counsellor. Interim counselling could thereafter be approved by the Eligibility and Implementation Committee and commenced, subject to later confirmation by the adjudicator.

While this precondition for interim counselling is not unreasonable, and imposes no real validation requirement, a program may also reasonably award interim counselling or therapy without any precondition other than the fact that a claim has been made. For example, the Kingsclear program in New Brunswick required no validation as a precondition for such counselling. Neither did the Nova Scotia Compensation Program. In my view, the nature of counselling distinguishes it from benefits such as monetary compensation.

Whichever approach is taken – and either is reasonable – an ADR process must be careful not to tie the need for therapy, whether interim or long-term, too closely to the alleged institutional abuse. Institutional abuse may be preceded or followed by abuse at home or elsewhere. It is often difficult to identify those psychological difficulties attributable to institutional abuse as opposed to other causes, nor should it be necessary to do so. I approve of the approach that permits counselling to be provided where institutional abuse *may* simply have *contributed* to the claimant's circumstances or difficulties that require intervention.

Determinations as to whether interim counselling should be provided can be made by advisory committees set up, in whole or in part, for that purpose. The George Epoch program took an interesting approach. A Counselling Advisory Group addressed counselling issues. As well, a Coordinating Therapist was appointed to spearhead decisions made as to counselling and their implementation.

54. A program may provide long-term counselling to claimants, either as part of a larger redress package which includes monetary compensation, or on its own. A free-standing program which only awards counselling or therapy (or related non-monetary benefits) may reasonably do so without true validation of any claimed abuse.

Two points are significant here. First, a program may be designed to provide interim counselling while deferring the validation of abuse until the completion of any criminal process or a specially designed validation process. As I later indicate, one reasonable alternative which is available for government to address the interplay between criminal proceedings and a compensation program is to defer determinations of compensation, while ensuring that the immediate needs of claimants are met through interim counselling.

Second, for any number of reasons, some of which are outlined in later recommendations, government may choose not to address reported institutional abuse through a comprehensive redress program. In such circumstances, it may nonetheless create a program that provides counselling or therapy only. I am of the view that a government could reasonably create a free-standing program that provides counselling or therapy without true validation of any claimed abuse. Put simply, the absence of a true validation process is unlikely to produce a multitude of false or exaggerated claims of abuse where the expectation is only that counselling or therapy will be provided.

In British Columbia, the Residential Historical Abuse Program provides counselling and therapy to individuals who allege they were sexually abused while institutionalized under provincial care or supervision. Verification that the individual was resident when the abuse allegedly occurred is sufficient. The Deaf, Hard of Hearing and Deaf-Blind Well-Being Program in British Columbia also provides specialized therapeutic services.

DETERMINING WHEN TO ADOPT A REDRESS PROGRAM

Relevant Considerations

The Law Commission determined that civil litigation may meet many of the needs of true victims of abuse, while satisfying other considerations, such as fairness. It noted that civil litigation has rules that, in theory, ensure fairness to all affected parties, and it can result in public accountability for defendants and monetary redress for plaintiffs. It may also serve a preventative and educational role. However, as an adversarial process, it is less likely to meet non-monetary needs of victims, their families or communities. As well, as the Commission noted, civil litigation may not be fully accessible to victims, given the costs of mounting a civil suit, and the fact that the adversarial process may be harmful to an emotionally fragile victim. However, as I have reflected above, traditional litigation also contemplates that lawsuits will be settled or that, as an incident to litigation, ADR be undertaken. The Law Commission suggested, as do I, that a different assessment of the civil justice system must be undertaken when ADR is resorted to. An ADR process incidental to litigation may also meet many of the needs and interests of true victims of abuse.

Accepting that a credible and fair validation process can be designed within the framework of traditional litigation or as part of a specially designed redress program, when, if at all, should a redress program be adopted as part of a government response?

55. In determining whether a redress program should be adopted, rejected or deferred, the following should be considered:

(a) the extent to which widespread or systemic abuse is involved;
(b) the status of criminal proceedings;
(c) the extent to which current employees are allegedly involved;
(d) the needs and interests of true victims of abuse;
(e) whether a redress program is fiscally responsible. This will depend, in part, on whether the government can credibly determine the likely outside limits of its financial exposure to potential claims.

Widespread or Systemic Abuse

An evidentiary foundation

56. Widespread or systemic abuse is not adequately addressed solely through the criminal process or may not be adequately addressed through civil actions brought by individual complainants against government or their alleged abusers. Where a credible basis exists for believing that widespread or systemic abuse has occurred, a redress program may reasonably form part of a government response.

Several points must be made here. First, the criminal process and individual civil suits generally cannot address systemic abuse. They are designed to fix liability, punish a specific abuser and, through the civil process, also provide redress to an individual plaintiff. Although a civil suit against government may address some systemic issues – since the liability of government and senior officials or staff may be in issue – and provide the impetus for change, the scope of a civil trial remains relatively narrow and generally does not invite a comprehensive examination of institutional policies and practices. Indeed, civil liability may be grounded in the vicarious liability of government, rather than upon any finding of systemic failures. As well, the settlement of civil actions – based on the instructions of individual plaintiffs – may mean that no systemic findings are made.

Second, multiple abuse claims should be addressed by government in a consistent way. Similarly situated claimants should be responded to similarly. As well, investigation preceding a determination as to the validity of multiple claims is best done globally, rather than considering each claim in isolation. This may enure to the benefit of an individual claimant, whose claim is corroborated by evidence that surfaces in relation to another claim, or to the detriment of the claimant, where evidence of collusion or contamination surfaces.

Third, even recognizing that an ADR process within a traditional litigation framework may be designed to accommodate the needs of true abuse victims, it may be more efficient and equitable that such accommodation be designed more globally through a redress program, rather than negotiated with each of many claimants or their counsel. As the Law Commission noted, a redress program is designed, in part, to better manage the costs of responding to claims for compensation, by avoiding the costs of defending against individual civil suits. As the Commission further noted, government is better positioned to "marshal non-financial benefits such as counsellors, therapists and education or training programs more efficiently."

Finally, the very creation of a specially designed redress program signals government's commitment to address the needs of true victims of abuse, contributing to the healing process and fostering reconciliation.

It follows that a redress program, rather than resort to traditional litigation, may be more attractive where there is a credible basis for believing that widespread or systemic abuse occurred. (Of course, a redress program may form only part of a government response to reported institutional abuse. For example, as was recognized in Nova Scotia, protection against future abuse also required an audit of existing policies concerning institutional abuse and its reporting.)

The challenge – as demonstrated in Nova Scotia – is in how a government is to determine whether a credible basis exists for believing that widespread or systemic abuse has occurred. In Nova Scotia, the government appointed Mr. Stratton, a well respected former Chief Justice, to determine whether the Government was liable for abuse. I have already articulated the problems with this aspect of the Government's response. The terms of reference were ill-defined and made it inevitable that Mr. Stratton would find some abuse, and hence an ADR process would be engaged. The investigation itself was flawed and may have contributed to later difficulties in properly validating claims. It was unfortunate that Mr. Stratton publicly made findings of fact, albeit qualified, given the limitations upon his investigation. However, many of these failings should not be visited upon Mr. Stratton, since he did not contemplate that his findings would obviate the need for proper validation of individual claims.

How, then, can a credible basis ("an evidentiary foundation") for believing that widespread or systemic abuse has occurred, be established?

57. An evidentiary foundation for widespread or systemic abuse may be derived from all or any of the following:

(a) prior criminal proceedings;
(b) prior administrative proceedings;
(c) a public inquiry;
(d) a police investigation;
(e) an independent investigation specifically mandated to address this issue.

Findings made in criminal and administrative proceedings may provide the evidentiary foundation, without more, to establish a specially designed redress program. The more contentious issues arise when government must look elsewhere to see if any such foundation exists.

Use of an independent investigation

58. Generally, an independent investigation is not a preferred approach. It should only be undertaken, and relied upon, if:

(a) no specific 'findings' of abuse are made;
(b) its limited objectives are explained by government to the public;
(c) the investigation is not viewed as a substitute for a credible, fair and accurate validation process to evaluate individual claims;
(d) the way in which it is conducted does not interfere with, or compromise, any existing or contemplated criminal investigation or prosecution; and
(e) it is conducted as part of an ongoing criminal investigation, or otherwise, with the assistance of investigators with specialized skills and training.

I do not generally support the creation of a separate investigation – independent of the police – to determine whether widespread or systemic abuse occurred. I have articulated certain preconditions to the use of such an investigation, most of which were not met by the Stratton investigation. In my respectful view, there appears to be little merit and obvious pitfalls in proceeding this way.

Public inquiries

Public inquiries are an obvious means of establishing whether an evidentiary foundation exists for widespread or systemic abuse. It is true that inquiries are legally precluded from making findings of criminal or civil liability against individuals, since "they cannot provide the evidentiary or procedural safeguards which prevail at trial."[235] However, they are able to address systemic issues, and make findings of misconduct necessary to carry out their mandates. It follows that they can determine whether or not systemic abuse exists. If it does, they can make officials and governments publicly accountable for systemic failures, make recommendations to prevent future abuse and educate the public. Public inquiries can therefore meet some of the needs of affected parties, including true victims of abuse.

The Law Commission argued that public inquiries may also delay appropriate compensation and divert financial resources from true victims of abuse. This has been the criticism of the approach taken in Newfoundland to the Mount Cashel affair, and these two concerns were cited by the Nova Scotia Government as reasons to bypass a public inquiry.[236] I agree that the first concern is legitimate: in some circumstances, a public inquiry may delay compensation.[237] I am less confident that the second concern could ever be validly raised to justify bypassing a public inquiry.

Public inquiries can also stigmatize alleged abusers. The NSGEU favoured a public inquiry from the early stages of the Government's response. One can see in the Nova Scotia context how a public inquiry would be viewed more favourably by employees than their exclusion from an ADR process. That being said, the absence of the full protections afforded to defendants in criminal or civil proceedings and the mandate of a public inquiry may mean that allegations of abuse are easily made, but not necessarily resolved, at such an inquiry.

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[235] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at 470-471.

[236] The internal documents suggest that these reasons alone do not entirely explain the Government's resistance to a public inquiry. Public inquiries often reflect poorly on government in general, whether or not its findings are attributable to the current Government or its elected officials.

[237] However, this is not necessarily the case: for example, where criminal convictions have clearly established the facts and would permit some claimants to be immediately compensated, despite the need for a public inquiry to address broader issues.

Finally, I am aware that the jurisprudence permits public inquiries to be held before related criminal proceedings are commenced or completed. However, there is little doubt that public inquiries may make concurrent police investigations or prosecutions more difficult.

In summary, there are factors for and against the use of public inquiries to determine whether widespread or systemic abuse occurred. Where there are obvious long-standing systemic issues, where government's own conduct may be implicated, and where recommendations may be directed to government to effectively address these issues, a public inquiry may be of great benefit. Where there is an allegation that government has covered up its prior misconduct, unless such an allegation is patently false, a public inquiry may be required to 'clear the air.'

In my view, a compelling case can be made that the Nova Scotia Government should have called a public inquiry. A number of civil suits had raised concerns about the possibility of widespread or systemic abuse and about the actions or inactions of government officials. No significant police investigation was then ongoing. Some criminal convictions had already taken place. The MacDougall proceedings had raised – with justification – issues surrounding the Government's conduct concerning him and, potentially, others. There were obvious systemic issues about how abuse – whether or not widespread – had been allowed to occur. It appears that the NSGEU would have supported a public inquiry. The alternative which Government chose, particularly the Stratton investigation, may have been superficially more attractive than a public inquiry, but it was flawed. Put simply, a public inquiry was a more than reasonable alternative for the Nova Scotia Government.

I should note here that some employees have urged me to recommend that a public inquiry be conducted now. Other employees, current and past, do not support such a recommendation. I am of the view that a public inquiry at this stage – whatever its merits might have been at an earlier stage – would be problematic. The Stratton investigation, Operation Hope, the IIU, the Compensation Program, the Samuels-Stewart audit, as well as this review, have all examined, with varying degrees of success and foci, the issues of concern. It would be difficult, if not impossible, for a public inquiry to obtain evidence uncontaminated by these prior events, and it would be unlikely to contribute at this point in a sufficiently meaningful way to a resolution of the issues.

Police investigations

I have earlier reflected that Government should consult with law enforcement agencies as to any proposed response to reported institutional abuse that might detrimentally affect an ongoing or contemplated criminal investigation or prosecution. As well, Government can determine, on an informal basis, whether any investigation has developed to the point that the police have formed credible grounds for believing that widespread or systemic abuse has occurred. I recognize that such grounds do not constitute proof and are not a *substitute for a true validation process.* However, such information can be important in determining whether widespread or systemic abuse likely occurred and, therefore, whether a redress program should be considered.

The Status of Criminal Proceedings

The Extent to which Current Employees are Allegedly Involved

These two considerations, which I identified as significant to whether a redress program should be adopted, rejected or deferred, are most conveniently dealt with together. They are both particularly relevant to whether a redress program, even if contemplated, should be deferred.

In recommendation 16, I stated, as a general principle, that "a government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. A paramount concern is that any government response not interfere with an ongoing or contemplated criminal investigation or prosecution. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings."

There is no doubt that the needs of true victims of abuse cannot be fully met by the criminal process alone. Other than holding perpetrators responsible for their conduct and, sometimes obtaining acknowledgement and an apology through a guilty plea, victims must generally look elsewhere for redress. Further, the criminal process generally does not address systemic issues, for example, how abuse was allowed to occur. Accordingly, the interplay between the criminal process and any other government response must be complementary.

Recommendations 29 and 30 reflect the concerns that generally favour the deferral of internal disciplinary investigations until related criminal investigations or prosecutions are completed. Nonetheless, I recognized that disciplinary proceedings should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

The concerns that generally favour deferral of disciplinary proceedings, earlier discussed, also have application to a redress program that must investigate and validate claims. The police are generally better situated to investigate allegations of criminal abuse. They have specialized training and skills in this area. The criminal investigation may obviate any need to conduct a separate validation process. Reliance may often be placed on the fruits of the investigation, or on any resulting criminal prosecution. A concurrent investigation for validating compensation claims may contaminate the criminal investigation through suggestive or otherwise inappropriate or incomplete questioning. An incomplete or inaccurate statement taken from a complainant can undermine – sometimes unfairly – the credibility of that complainant at the criminal trial, even though, for example, omissions in a statement are more properly attributable to the statement-taker than to the statement-giver. The validation process may compete with the criminal investigation for relevant documentation and, indeed, may obtain such documents in a way that compromises their subsequent admission in any criminal prosecution. The desirability of minimizing trauma to true victims of abuse is potentially undermined by a multiplicity of interviews where individuals are asked to recount and relive their experiences.

There are additional concerns. The fact that compensation has been agreed upon, or even paid out, before a criminal prosecution, may make the complainant an easy target for cross-examination.[238] Conversely, the fact that compensation has been paid out, and the government has apologized for abuse, may, if it becomes known to a judge or jury, erode the presumption of innocence.

The extent to which current employees are allegedly involved is also particularly relevant to the design and timing of any redress program. Allegations against current employees engage disciplinary issues and, as a result, the concerns raised about the interplay between the criminal and disciplinary processes. Even where the criminal process is not involved, a redress program must consider its impact on the ability of government to determine the facts for disciplinary purposes.

59. Generally, though not invariably, the investigation and validation of claims for compensation should be deferred to await the completion of related criminal investigations or prosecutions. In this context, the appropriate balancing of interests may not require that such deferral await the completion of any appellate criminal proceedings.

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[238] I recognize that a motive to fabricate or exaggerate may be said to exist even where there is some expectation that compensation will be available in the future.

There may be circumstances where the balancing of interests favours the investigation and validation of compensation claims prior to the completion of related criminal investigations or trials: for example, where the criminal trial does not involve issues of credibility, but legal or *Charter* issues only, validation may not have to be deferred. Or, where the disciplinary process cannot fairly await the completion of related criminal proceedings (as per recommendations 29 and 30), there may be less concern about addressing compensation issues in advance of any criminal disposition.

The Needs and Interests of True Victims of Abuse

The needs and interests of true victims of abuse must figure prominently in any determination whether a redress program should be adopted, rejected or deferred.

I have already reflected the ways in which a redress program advances the needs of abuse victims in ways that other government responses do not. Where an evidentiary foundation exists to believe that widespread or systemic abuse exists, and there are no contemplated or existing criminal investigations or prosecutions, or such proceeding have been completed, a specially designed redress program is an attractive option for government.

In some respects, the deferral of a redress program may be less capable of meeting the needs of true victims of abuse. Deferral will often heighten anxiety, prevent closure, and delay any reconciliation and healing that would flow from both government's recognition of a claimant's victimization and the monetary and non-monetary redress that might be provided. A deferred redress program might ultimately process claims in an expeditious way, but cannot be said to offer benefits in a more timely way, a feature generally cited in support of the use of such a program.

On the other hand, deferral may ultimately minimize trauma by avoiding the necessity of being interviewed or having to testify and relive painful experiences a number of times. A decision not to address compensation until the completion of any criminal process may make it more likely that perpetrators will be found criminally accountable, and less likely that false or exaggerated allegations are advanced in a criminal process.

It must be recognized that claimants remain entitled to initiate and advance a civil suit, or a criminal injuries compensation board claim, even while criminal proceedings are pending. It must also be recognized, as reflected in recommendations 53 and 54, that some benefits, particularly counselling or therapy, need not await validation. Put simply, even where validation and a determination of full redress is deferred, a claimant has options both within and outside a redress program to address his or her needs.

Fiscal Responsibility

60. Government should generally not commit itself to a redress program unless it is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims.

A case can be made for the proposition that a specially designed redress program may ultimately cost government less than responding to individual civil lawsuits, even acknowledging that traditional litigation need not involve a fully adversarial process. In this regard, one must include not only those costs associated with the defence of claims, and any damages to be paid, but the overall costs to the administration of justice (including the assignment of judges and the devotion of court resources to multiple lawsuits). Even if it cannot be definitively shown that a redress program would cost government less than traditional litigation, it would not necessarily follow that a redress program could not be adopted. A case can be made for the proposition that any additional costs associated with a redress program may be offset by its benefits to true victims of abuse and society as a whole.

However, government must be able to credibly evaluate the likely costs of a redress program and the other options. I have earlier concluded that the Nova Scotia Government's evaluation of the costs of its available options was critically flawed, and contributed to the decision to adopt the Compensation Program, despite its serious shortcomings.

For a government to evaluate the likely costs of a redress program, it must be able to credibly determine its likely outside financial exposure to potential claims. In other words, it must credibly assess the number of claims likely to be made and the likely financial exposure associated with these claims. As the Law Commission noted, "[a]n accurate estimate of the number of potential claimants and the level of benefits to be paid out is an essential element in the design of a redress program."

A completely open-ended redress program is not fiscally responsible. Further, it may compel changes or cancellation of the program based solely upon the unavailability of financial resources, adversely affecting the emotional well-being of legitimate claimants for compensation or other redress. The significance of this point to the Nova Scotia experience is obvious.

61. Government may determine, on a credible basis, the likely outside financial exposure to potential claims in a variety of ways:

(a) the subject institutions may encompass a finite and limited number of potential claimants;

The Nova Scotia program cannot reasonably be so regarded, given the number of residents who passed through the subject institutions.

(b) by providing a deadline for the submission of notices of intended claims that predates a final determination of the precise components of the redress program;

(c) by limiting the program, at least on a pilot basis, to a specific institution, specific years, specific age groups or other limiting criteria.

Balancing the Relevant Considerations

62. Where

(a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
(b) no related criminal investigations or prosecutions exist or are contemplated, or such proceedings have been completed, and
(c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government to address reports of institutional abuse.

63. Where

(a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,
(b) related criminal investigations or prosecutions *do exist or are contemplated*, and
(c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government, provided that:

(d) **counselling or therapy is immediately available to claimants, without true validation of their claims, and**

(e) **claims are processed in an expeditious way, once related criminal investigations or prosecutions relating to that claimant are completed.**

This approach contemplates that a specially designed redress program may be structured and, indeed, commenced, although individual claims may not be processed until the completion of related criminal proceedings. There will, however, be circumstances where even the design of the redress program should be deferred until the completion of criminal proceedings or a public inquiry, should the latter option be pursued.

INVESTIGATIONS TO VALIDATE ABUSE FOR COMPENSATION PURPOSES

There will be circumstances where an investigation needs to be conducted to validate claims of abuse for the purposes of compensation or redress. Examples, such as the situation where criminal or disciplinary proceedings are never initiated, have earlier been given.

64. The preceding Recommendations that govern the conduct of internal disciplinary investigations, particularly Recommendations 32 to 34, have equal application to investigations conducted to validate claims of abuse for the purposes of compensation or redress.

I do not intend to elaborate in any detail on the various methods that may or may not be used to conduct interviews. However, several comments pertaining to the interviewing of claimants are warranted.

Investigators are entitled, indeed obligated, to consider circumstances that may adversely affect the credibility or reliability of a claimant: for example, whether a motive exists to make false or exaggerated allegations; whether the claimant's criminal or anti-social background invites caution; whether there is a potential for collusion or contamination; and whether a pre-existing animus towards government, its institutions or individual employees, unrelated to the alleged abuse, exists.

However, every witness is entitled to respect. Their accounts should be evaluated free from speculative myths, stereotypes and generalized assumptions. In my view, investigators should generally not arrive unexpectedly at a witness' doorstep to conduct an interview.[239] It must be recognized that true victims of abuse may require ongoing support to deal with the memories triggered by such an investigation. Every witness who alleges abuse is generally entitled to have a support person present for interviews. However, investigators may take measures, not inconsistent with the role to be performed by such support persons, to ensure that the integrity of the investigation is not compromised. So, for example, investigators may appropriately limit the support person's active involvement in responding to questions directed to the claimant.

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[239] There were several allegations made that the IIU engaged in this kind of behaviour. The IIU provided a detailed refutation of these allegations. This recommendation is not dependent on any finding one way or the other.

Employees are entitled to be treated with the same respect. Their evidence must also be evaluated free from speculative myths, stereotypes and generalized assumptions.

These comments reflect my concern that, all too often, the conduct of investigative interviews is unduly influenced by preconceived notions about the credibility or reliability of the witnesses under consideration. Open-mindedness and fairness should always be the hallmark of an investigation.

ACCOMMODATION WITHIN A LITIGATION FRAMEWORK

65. Where government chooses to respond to reported institutional abuse within a litigation framework, consideration should be given to how government litigators can accommodate and show sensitivity to the interests and needs of plaintiffs, who may be true victims of abuse, even while testing the veracity of their claims.

As part of such consideration, government can craft principles in writing to guide its litigators, consistent with this recommendation. Such principles would not only include accommodations compatible with the need to critically evaluate a claim, but might include waiver of limitation periods and other defences that are likely to prevent a determination on the merits.

This recommendation addresses the needs of plaintiff litigants. There is, of course, a need for government to show sensitivity in the context of traditional litigation to the needs and interests of former and current employees accused of abuse.

RANGE OF BENEFITS AVAILABLE TO REDRESS PROGRAMS

66. It is appropriate for redress programs to offer some or all of the following benefits:

(a) monetary compensation;

(b) financial or debt counselling;

(c) psychological counselling or therapy;

(d) treatment facilities, such as may be provided at alcohol and drug rehabilitation centres;

(e) literacy training, educational upgrading or vocational training and rehabilitation;

(f) educational or vocational assessments and counselling;

(g) medical or dental services that either remove vestiges of a claimants' prior incarceration, such as tattoos, relate to the consequences of institutional abuse or mistreatment, or otherwise affect the claimants' emotional well-being;

(h) payment of miscellaneous expenses, such as child care, transportation, computer and textbook costs, to enable claimants to obtain many of the above benefits;

(i) an acknowledgment and apology, made publicly to survivors generally, privately to validated claimants, or both;

(j) a telephone crisis line;

(k) a historical record of abuse. The contents of, and access to, such a historical record must remain consistent with the fairness to be accorded to alleged abusers who may face criminal or disciplinary proceedings;

(l) a memorial;

(m) programs, actions or commitments that the government may undertake or foster which may provide benefits to survivors or the public generally, such as legislative, policy or research initiatives, public education or the establishment of a healing centre or healing fund to be administered by the community.

These categories are drawn from a number of the programs examined in Chapter XVI of this Report. Only some of the categories are elaborated upon in the recommendations that follow. Some programs also provide for a contingency fund, in a fixed sum per validated claimant, for miscellaneous expenses not otherwise covered or covered insufficiently.

MONETARY COMPENSATION

Compensation Grid

67. A compensation grid is one valid way to promote greater certainty and consistency in the monetary awards given to validated claimants. However, any program must recognize that there is no necessary connection between the nature, severity and duration of abuse, and the

impact of that abuse upon its victims. It follows that monetary and non-monetary benefits should not be solely dependent upon the nature, severity and duration of abuse.

The principle that similarly situated individuals should be similarly dealt with requires that there be some consistency in the monetary awards given to validated victims. Such consistency also promotes predictability as to the likely disposition of unresolved claims, thereby facilitating early and less contentious resolution, benefiting all parties. It may permit claimants to make more informed decisions as to whether they will participate in a redress program. Predictability also permits government to estimate and control its costs and make fiscal plans for the future.

As the Law Commission pointed out, attempting to achieve consistency through a grid that places a monetary value or range upon abuse, based upon its type, duration or frequency, may be seen to "dehumanize survivors by subjecting them to formulae or tables for compensation that do not really reflect their unique experiences." The Nova Scotia experience makes this point well. The grid came to be described privately by many participants as the "meat chart."

In addition, it is well documented that the impact of abuse on its victim is often not correlated to the type, duration or frequency of abuse. For example, what a grid might characterize as minor sexual or physical assault could have a devastating effect on a particular individual, based on a wide range of factors, including whether the victim's allegations were initially disbelieved by others. This point was fully explored in Chapter I of this Report. Therefore, a grid based solely upon the type, duration and frequency of abuse is incapable of fully recognizing the impact of abuse upon victims. The Law Commission stated that the "premise is that within the established ranges some differentiation of claims to recognise the unique situation of each claimant is possible, but that the cost and time required to establish anew the amount of every claim would be not justifiable given the desire to make compensation available in a timely and efficient manner."

That being said, I am of the view that a government is justified in creating a grid to promote greater consistency and certainty in the compensation process. A grid that permits a discretionary increase within each category has *some* ability to recognize the unique impact of abuse upon individuals. Further, grid categories can be based not only upon the nature, severity and duration of abuse, but also upon the level of injury or harm occasioned, or contributed to, by the abuse. This was the approach taken in the Grandview agreement.

No grid will be perfect, but it may be preferable to an open-ended evaluation of each individual claim. As well, a grid's contents are to be arrived at through the full participation of claimants. Put simply, some concerns are alleviated by their engagement in the process. In my view, in those exceptional cases where the impact of abuse upon its victims is such that the compensation grid is wholly inadequate, the claimant may be better served in resorting to traditional litigation. Again, traditional litigation also contemplates settlement, based upon mutual disclosure of relevant information, including medical evidence. Government may be well situated to settle a small number of exceptional cases outside a redress program.

Monetary ceilings

68. A redress program should be designed to fairly compensate true victims of abuse, but remain mindful of the overall benefits offered by a redress program and the ways in which the needs of the claimant are better served through this program. It should also not be so generous as to provide an overly powerful incentive to the making of false or exaggerated claims.

Where a grid is employed, a maximum compensable amount is designated for the most serious category of abuse. In Nova Scotia and in New Brunswick, $120,000 represented the maximum amount compensable. In Grandview, the maximum was set at $60,000. A maximum compensable amount may be designated even in the absence of a grid.

A determination of the appropriate maximum compensable amount has been said to be an art, not a science. My recommendations cannot purport to fix what the maximum amounts should be. Ultimately, this is an item that is subject to negotiation. However, it should be affected, in part, by the following considerations:

(a) the amount of money available to the program. This is a political judgment, rather than a legal one;
(b) the anticipated number of claims and claimants; and
(c) the likely level of compensation that would be awarded in civil proceedings and the net amounts likely to be left with a successful claimant.

The Law Commission concluded that "[t]he level of benefits must be attractive enough to cause claimants to opt for the program, rather than launch a civil action, but may reasonably be expected to reflect the lower cost and greater certainty of recovery of claimants under a redress program." Generally, claimants may be motivated to enter into a redress program, despite the possibility of a higher monetary award through litigation, because it better serves their other needs, offering a wider range of benefits, more quickly, in a less adversarial, more private setting. Some suggest that this means that the monetary benefits should be 'discounted' to reflect that the needs of claimants are otherwise better served within a redress program.

The suggestion that true abuse victims should receive less than what they would otherwise be entitled to raises obvious concerns, as does the suggestion that their claims should be 'discounted.' Indeed, in respect of the federal Government pilot projects, the Government has committed itself "not to try to negotiate less than the amount it believes a court would award."

Part of the debate here may simply reflect the need for some sensitivity and common sense in the language employed, rather than any real differences in how awards should be quantified.

It is also a matter of common sense that there will be some correlation between the level of monetary benefits and the motivation to submit false or exaggerated claims. Two propositions therefore follow. First, the level of benefits should not be so generous as to unduly encourage fraudulent claims. Second, apart from fairness issues to alleged abusers, higher monetary benefits may require greater scrutiny or verification of individual claims.

Periodic Payments v. Lump Sums

69. A redress program may validly be designed either to provide monetary compensation through lump sum payments, periodic payments or a combination of the two. The needs of validated claimants must figure prominently in the determination as to how monetary compensation is to be paid.

70. Given that the needs of validated claimants will differ, any redress program that presumptively provides monetary compensation through periodic payments should have the flexibility to accommodate the specific needs of individual claimants.

71. It is generally preferable that discretion in individual cases as to the way in which monetary compensation will be awarded not be exercised solely by government officials.

Government may compensate validated victims through periodic payments, lump sums or a combination of the two.

Periodic payments may be said to protect the recipients from themselves. The Nova Scotia program saw abuses in the way some lump sum payments were quickly dissipated and, in some instances, even used to finance illegal activities. Structured payments may also better accord with government's budgetary concerns. Finally, a number of victims, such as those serving lengthy periods of incarceration, may reasonably be regarded as having little or no pressing interest in a lump sum payment.

On the other hand, structured payments may make a redress program less attractive than civil litigation, and may be regarded as patronizing or paternalistic. The imposition of structured payments may be looked upon by claimants who were victimized while under government's control as a further exercise of control by government, antithetical to claimant recovery and healing. Finally, structured payments may interfere with important and legitimate uses that can be made of compensation, such as the acquisition of a home or business.

The way in which monetary compensation is paid to validated claimants is, again, an item that is subject to negotiation. However, I am prepared to say that it would be one reasonable approach, though not the only approach, for a government to promote a program that generally compensates validated claimants through structured payments. It would also be appropriate – indeed desirable – to incorporate provisions that permit relief from structured payments in suitable cases.

Where an advisory group or implementation committee exists as part of a redress program, composed of government, claimant and independent representatives, it may be appropriate to permit such a group or committee to decide whether relief from structured payments in favour of a lump sum payment should be given in particular cases. This would avoid the concern that government not be seen as controlling.

Of course, even where a program provides for lump sum payments, the recipients should always have the option of taking structured payments instead.

It is also appropriate for redress programs to provide for financial counselling, if desired, for recipients of compensation.

COUNSELLING

In my view, counselling or therapy is a benefit of prime importance. Earlier, I addressed the level of validation, if any, needed to support an award of counselling. Here, I address restrictions upon counselling and how this is to be arranged.

The Law Commission reflected that "programs may allocate a specific amount for such services or may undertake to pay a therapist directly. Some programs allow survivors to choose the therapist and the form of therapy they prefer. Others designate those therapists whose services will be remunerated. Frequently there is a ceiling either on the amount allocated to therapy or on the period for which funding will be provided." In my view, these alternatives, drawn from existing programs, are all reasonable.

72. It is generally preferable that a redress program not simply pay money to a claimant in the expectation that it will be used for counselling or therapy. Instead, the program may pay service providers directly or through a fund, administered by a designated committee or group.

I regard it as reasonable, indeed prudent, for government to insist that it pay therapists directly or that they be paid through an administered fund, rather than create another area for potential financial abuse. A number of programs have proceeded in this way. Of course, this recommendation has no application to any monetary award that the claimant is entitled to apart from any allocation earmarked for counselling or therapy.

73. A redress program may reasonably impose a maximum monetary value on the amount of counselling or therapy which may be obtained. It may also reasonably impose a time frame within which eligible counselling or therapy may be obtained. However, such a program should specifically provide a mechanism for relieving against these restrictions, based upon demonstrated need.

A number of claimants, with whom I spoke, expressed concern over this issue. For some, their eligibility for continued counselling had expired, although their need for such counselling remained. Grandview survivors articulated some of the same concerns.

In my view, it is contrary to the greater public interest to cut off therapy or counselling prematurely and thereby compound the harm caused by abuse. Recognizing that any program must show fiscal responsibility, I am nonetheless of the view that, in this area, undue restrictions upon the continuation of needed counselling or therapy potentially undermine the rationale of a redress program, and ultimately operate to the detriment of society.

74. The discretion whether to relieve against restrictions on counselling or therapy should generally not be exercised by government officials alone, but rather by an advisory or implementation committee, including representatives of government and claimants.

75. A redress program can establish accreditation for eligible counsellors or therapists.

To state the obvious, it is desirable that therapists be competent, experienced and well trained to assist survivors in addressing the impact of institutional abuse and related issues. Accreditation does not guarantee, but does advance, this desirable goal.

As well, it should be noted that poorly qualified therapists or counsellors can foster, however inadvertently, inaccurate accounts of abuse. This is of particular concern where counselling precedes judicial or administrative proceedings or another validation process. I recognize that therapy or counselling is, by its nature, supportive and is not designed to critically evaluate the accuracy or reliability of accounts of abuse communicated. However, the danger that it will have an impact on those accounts is real, and should be avoided wherever possible.

The answer is not to limit access to therapists or counsellors. The need for true victims of abuse is too important, both in dealing with their prior victimization and the impact of the legal proceedings or redress processes themselves. But counsellors or therapists should be sensitive to the forensic issues likely to follow and the need to maintain the integrity of the claimants' independent accounts.

ADDITIONAL NON-MONETARY BENEFITS

76. (1) As earlier indicated, a redress program can provide for a variety of non-monetary benefits to validated claimants, such as educational, vocational or financial counselling, and medical or dental services.

(2) It is again generally preferable that a program not simply pay money to a claimant in the expectation that it will be used for such non-monetary benefits. Instead, the program may pay service providers directly or through an administered fund.

(3) Here too, determinations can be made by an advisory or implementation committee. A fund can be created to be administered by such a committee. As well, a fixed maximum sum may be designated as the amount that might be made available to individual claimants.

ACKNOWLEDGMENTS AND APOLOGIES

77. A public apology made on behalf of government to abuse survivors, and apologies privately made to individual survivors, promote reconciliation and healing. It follows that such apologies may appropriately form part of a redress program.

78. The timing and the content of apologies, whether publicly made to survivors generally or privately made to individuals, should be mindful of outstanding disputes over the validity of claims of abuse.

The Law Commission stated that "apologies must be delivered in a timely way, given the passage of time that has already taken place since the abuse occurred." It is true that the earlier an apology is made, the more likely it will contribute to the recovery and healing process. However, it will generally be preferable that apologies be deferred until the conclusion of relevant validation proceedings, be they within the context of a redress program or the court system. Otherwise, the rights of those accused of abuse to a fair hearing may be significantly affected, even where the apology does not specifically identify the abusers.

79. Alternatively, a public apology should expressly recognize that:

(a) some true victims of abuse have been identified and are therefore appropriately recipients of an apology from government at this time;

(b) the apology should not be regarded as an indication of the merits of any individual claims of abuse that remain outstanding.

For true victims of abuse, this kind of apology might appear qualified, legalistic and, therefore, unhelpful in serving their needs. This supports the view that the preferable course is to defer a public apology until it is unlikely to prejudice an ongoing or contemplated validation proceeding.

BENEFICIARIES OF A REDRESS PROGRAM

80. Benefits may be restricted to those who were actually abused. Alternatively, they may be extended to their families, to those who have been adversely affected by the victims' destructive behaviour, or to witnesses adversely affected by abuse.

81. Generally, monetary compensation should be restricted to those who were actually abused. However, counselling or therapy may appropriately be extended to family members, particularly since such counselling may reasonably be expected to have a salutary impact on the victims themselves, as well as their families and communities.

For example, the Helpline Reconciliation Agreement (pertaining to St. John's and St. Joseph's) provided counselling to family members.

CONDUCT ATTRACTING REDRESS

82. The breadth of compensable conduct is, ultimately, negotiable. However, some factors upon which this determination might be made include:

(a) the evidentiary foundation for the conduct under consideration. For example, where there is extensive evidence of physical, but not sexual, abuse, it might be preferable to address only the former within a specially designed redress program;

(b) the fiscal implications of such a determination;

(c) how interrelated the types of abuse are. It may be impractical to separate out factually interconnected abuse into compensable and non-compensable categories;

(d) the likelihood of facilitating an advocacy group for claimants: the more diverse the potential claimants, the less likely that they can speak with one voice;

(e) the extent to which the different types of abuse generate significantly different issues;

(f) the extent to which physical abuse is alleged to represent conduct which was lawful when it occurred. If this is to be regarded as compensable, it raises very different issues than conduct that was criminal when committed.

A redress program can narrowly or widely define the conduct that will attract compensation or other redress. In Nova Scotia, both physical and sexual abuse were compensable. The Jericho program compensated sexual abuse only. The George Epoch program compensated for "physical sexual abuse." Grandview compensated for pain and suffering as a result of abuse and/or mistreatment.

PROCESS ISSUES

The Administration of a Redress Program

As the Law Commission noted, the body funding a redress program often takes primary responsibility for administering it. This may create a perception of conflict of interest and may be of concern to true victims who regard government as having already betrayed their trust by allowing the abuse to have occurred. The Law Commission concluded that, where possible, those administering the program should be independent of those funding it.

83. Generally, government should retain responsibility for administering a program it is funding. Accountability to the public and fiscal responsibility make this approach an appropriate one. However, the concerns about a perception of conflict of interest can be addressed through the creation of an advisory body containing representatives of government and victims to address issues that arise in the administration in the program. Such a body should not address the merits of individual cases.

The Law Commission noted that the concerns over a government administered program may also be addressed through the negotiation process leading to the creation of a redress program. Sufficient trust may be established during that process to reduce the concerns. I agree. The administration of some of the programs outlined in Chapter XVI was shared by non-governmental bodies.

Informed Decisions

84. Potential claimants should be informed about available options in an understandable and thorough way.

85. Information should be disseminated about available options in a way that does not compel former residents to disclose their background to their families or friends.

86. This generally means that the media represents the best way to initially inform potential claimants about available options. Press releases, public announcements and advertisements need not be comprehensive, but merely alert the public as to how to initiate contact to learn more about the process.

The Law Commission stated that information about the redress options should be provided in an "impartial manner." According to the Law Commission, this meant that:

> the information should not be provided by someone who has a personal professional stake in representing these potential plaintiffs in a civil action, who relies on them as witnesses in a criminal prosecution, or who counsels them as private clients in a therapeutic setting. Ideally, existing public agencies that offer services to victims (for example, sexual assault centres) could be used as vehicles for dispensing this information.

With respect, it is impractical, and perhaps unwarranted, to suggest that lawyers for former residents cannot be trusted to inform their clients of the redress options available to them. Indeed, those who have retained lawyers to proceed to civil litigation must discuss with their counsel the respective merits of seeking redress from a compensation program rather than through the courts. I note that the Grandview program required that claimants obtain independent legal advice, at the government's expense, before entering into the program. In any event, sexual assault centres may not be well situated to advise potential claimants as to the respective merits of these options.

That being said, I do not entirely disagree with the Law Commission's views in this regard. The Family Services Association in Nova Scotia performed a valuable service in informing prospective claimants about the process in a supportive environment. Where redress programs involve claimant advocacy groups, they also can perform an important role in educating prospective claimants about the options available to them.

87. Any agreement governing a redress program should be written, to the extent possible, in plain language or non-legalistic terms.

Tom Marshall, one of the architects of the Grandview program, stated that the need for plain language reflects the fact that many claimants are less educated and may experience difficulty when attempting to understand an agreement that is set up largely to assist their healing. He felt that the Grandview process could have been improved if there was a booklet distributed to claimants, clarifying the agreement's purpose and terms.

The Formation of a Claimant Advocacy Group

88. The formation of a claimant advocacy group greatly facilitates the creation and implementation of a successful redress agreement. It may provide a single point of access to claimants. It is capable of giving claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct

involvement of such advocacy groups with government promotes a degree of trust, and facilitates reconciliation and healing. It also gives a sense of empowerment to the claimants.

89. Government should facilitate the formation of such claimant advocacy groups and their involvement in the creation and implementation of redress agreements. This should often include financial assistance, both to enable such groups to form, and to communicate with and offer support to their constituency. This should often also include financial assistance for legal counsel to advise and represent the group.

90. Where a redress program is under consideration, multiple claimants may have already retained their own counsel to advance potential lawsuits. It must be recognized that these claimants are fully entitled to pursuelawsuits, with the assistance of counsel. However, it may best serve the needs of claimants generally that their interests be pursued collectively, with greater prominence given to their advocacy group.

In Nova Scotia, the Government was unsuccessful in persuading the many claimant lawyers that the preferable course was to facilitate a claimant advocacy group, itself represented by counsel. Of course, such a model would have inevitably excluded a number of lawyers from continued participation in negotiating a redress program and, perhaps, from participating in seeking redress for claimants.

Some are of the view, as am I, that Nova Scotia officials moved too quickly to reach agreement on the structure of a Compensation Program. In Grandview, negotiations took 10 months; the St. John's and St. Joseph's negotiations took one-and-a-half years. During these more extended negotiations, trust was developed and a consensus more easily reached. In the latter case, a person of the stature of Douglas Roche, now Senator Roche, also facilitated agreement between the parties.

This is not to say that the Nova Scotia Government could have persuaded the claimants' lawyers that their clients' interests would best be represented collectively in the way described in this recommendation, even if the negotiations had lasted longer and been spearheaded by someone else. Nor is this recommendation intendedto criticize claimants' lawyers for not stepping aside in favour of a collective approach involving far fewer lawyers.

It must be recognized that the involvement of the many lawyers in the operation of the Nova Scotia Compensation Program was at times unsatisfactory. While some represented their clients well, the quality of representation was uneven. The involvement of so many lawyers, a number of whom had to learn about the Program for the first time, undoubtedly contributed to the overall costs of legal representation – over $4.5 million. While recognizing that an individual may decide to choose his or her own counsel, there is also no doubt that a specially designed redress program may function more efficiently and effectively for claimants generally where their advocacy group figures more prominently in the design and implementation of the program. This remains compatible with the involvement of lawyers in providing independent legal advice to potential claimants.

Finally, I should note that circumstances may exist that effectively preclude the formation of an effective advocacy group: for example, where claimants are alleged to have abused other claimants.

Consultation with Affected Groups

91. **Where the government contemplates that its response to reports of institutional abuse may involve alternatives to traditional litigation, it should broadly consult with potentially affected groups to obtain input on the design of that response.**

I recognize that government should not be compelled to bring claimants and those accused of abuse together to negotiate the design of a redress program. Such a requirement would be patently unreasonable. Instead, this recommendation reflects that the flaws in the design of a government response may be avoided through broad consultation with affected parties, unless totally impracticable. In Nova Scotia, such an approach might well have ensured, for example, a credible and fair validation process.

Relinquishing the Right to Sue

92. **Generally, a redress program should require that claimants relinquish their right to sue the government as a condition of their participation in the program.**

93. **A redress program may provide that this right be relinquished at various stages in the process:**

(a) upon filing a demand or claim for compensation within the program;

(b) when the demand or claim is submitted for an initial assessment as to whether it will be permitted to be processed within the program;

(c) when the claim is submitted to a fact finder for binding determination.

94. The point at which the right to sue will be relinquished is appropriately the subject of negotiation between the parties. It may be dependent upon many considerations. However, a program that permits opting out after issues of credibility have been determined or after the amount of compensation has been fixed will lack credibility, waste resources, and fail to promote public acceptance of the process.

Dispute Resolution

95. An agreement governing a redress program should specifically address how disputes over its interpretation or generally in the implementation of the program are to be resolved.

The Deadline for Filing a Claim

Rather than recommend a fixed period, my recommendations address those considerations that should affect the decision as to the deadline for claimants to submit a claim for compensation.

96. In setting the deadline for filing a claim for compensation to a redress program, consideration should be given to:

(a) the extent to which there are difficulties in making the program known to former residents;

(b) the recognition that former residents may no longer be in the jurisdiction;

(c) the recognition that true abuse victims may find it emotionally challenging to respond, may be at different stages in their personal recovery and, as a result, may require time and support in order to participate in a redress program;

(d) the desirability that government ascertain the scope of the potential program before proceeding;

(e) the potential number of claimants involved;

(f) the desirability that the redress program not be unduly delayed;

(g) the desirability of reducing the potential for collusion or contamination of claims.

In my view, reconciliation of these sometimes competing considerations may support some mechanism to permit out-of-time applications, upon proof of compelling circumstances. Government should always be entitled to waive a time requirement. On the other hand, a program that excludes out-of-time applications *may* be supportable, given the fact that ineligibility for a redress program generally leaves the claimant the option of resorting to traditional avenues of relief.

Another alternative is to create tiers of claimants, based in whole or in part upon when they first initiated a claim for compensation or when they first reported abuse to the authorities. The rigours of the program's approach to validation, and the range of available benefits, may be different, depending upon the tier involved.

This approach was taken for St. John's and St. Joseph's claimants and commends itself to me. It permits government to limit, but not necessarily preclude, applications made after time deadlines for filing claims have expired. This is not only fiscally responsible, but recognizes that some true victims of abuse may be more psychologically capable than others to bring forward claims in a timely way. Nonetheless, although the timing of a claim may influence how it is addressed within a redress program, government should not fall into the error, earlier described, of necessarily correlating the absence of a timely claim with its falsity.

Promoting Consistency in Fact finding

97. A program may reasonably provide for processes that promote procedural and substantive consistency on the part of fact finders, without compromising their independence. Such processes may include:

(a) creation of a template by fact finders for their written reasons;

(b) informal review of fellow fact finders' draft reasons by a designated fact finder, or by the full panel of fact finders;

(c) group meetings of fact finders to review the procedures that govern fact finding sessions, and the decisions that have been rendered.

In Nova Scotia, the sheer number of file reviewers, the way in which they were selected to conduct individual reviews, and the absence of any collective training sessions all worked against any consistency in procedures or results. The Compensation Program was entitled to provide that reviewers' decisions were not binding upon other reviewers. It was also entitled to promote consistency through a book of claimant statements said to represent categories of abuse. However, the approach advocated in the above recommendation, and adopted during the Grandview program, better promotes consistency in procedures and results, and remains compatible with the independence of individual fact finders. Indeed, it represents the practice for many administrative tribunals.

Training for Those Conducting or Administering a Process

The Law Commission suggested that those involved in administering or implementing responses to reported institutional abuse must have sufficient training to ensure that they understand the circumstances of survivors of institutional child abuse. This suggestion forms part of the recommendations that follow.

98. Those involved in the design, administration or implementation of government responses to reported institutional abuse should, by prior experience or training, have an understanding not only of institutional abuse but also, where applicable, of how credibility and reliability are to be assessed, free from speculative myths, stereotypes and generalized assumptions. Their experience and training should enable them to show sensitivity to the vulnerability of true victims of abuse, while remaining open-minded about the issues in dispute in a way that is compatible with a credible and fair program.

99. All or some of the fact finders should have specific experience and training pertaining to discriminatory treatment based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability.

100. It may be appropriate that the experience and training of those involved in a government response should be supplemented by training specific to the redress program. Some programs will compel specialized experience or training.

For example, a workshop on aboriginal cultural awareness represents appropriate training for fact finders involved in the federal Government pilot projects.

101. The nature and contents of this training should be the subject of discussions among those who participate in the creation of the redress program.

102. Such training should extend to administrators of the program, those within government who may be mandated to initially vet claims, those who investigate claims and, ultimately, the fact finders.

103. Prior experience and training of fact finders in analogous areas will often be desirable and appropriate. For example, members of a criminal injuries compensation board, former members of the judiciary, human rights or personal injury claims adjudicators, are examples of individuals who are generally well situated, by experience and training, to address these issues. Legal training is generally desirable.

Some of the file reviewers in Nova Scotia had a wealth of experience that fully qualified them to adjudicate abuse claims. Others were less qualified. I was impressed with the selection criteria for Grandview and for St. John's and St. Joseph's. In the latter case, all fact finding was done by designated members of the Ontario Criminal Injuries Compensation Board. The Grandview adjudicators represented a wide range of experienced lawyers and adjudicators.

Appellate Review

A redress program may properly provide, as did Nova Scotia, for a review from an offer made by government to a claimant in negotiations. Or, a program may have a committee vet an application, as was done by the Reconciliation Process Implementation Committee in the St. John's and St. Joseph's program, before submission to the fact finder(s). However, redress programs should generally discourage an appellate process, which, in my view, is largely incompatible with the perceived benefits of an alternative to traditional litigation: speed, reduced costs, finality, and the participation of affected parties in the design of the process itself.

The Law Commission noted that some validation processes provide for a rehearing where new evidence has come to light, or permit a summary reconsideration of the first decision by a panel of other first-instance decision makers. The concern here is to balance the need for finality with the desirability of ensuring that a wrong decision (whether favouring government or the claimant) may be corrected, when new evidence becomes available.

104. Generally, determinations made by the fact finder(s) within a redress program should be final. The goals and rationale of a redress program are largely incompatible with an

appellate process. A program may or may not provide for limited review to address jurisdictional error. Some limited mechanism may also be created to revisit decisions based on the availability of fresh evidence. However, there should be a high evidentiary threshold to overcome before a decision should be revisited. Demonstrable fraud may suffice, as may the availability of new evidence which could not have been discovered through the exercise of due diligence by the party seeking to tender the documentation.

Evaluation of the Government Response

105. A redress program should provide for its own evaluation by participants. This enables government in particular to assess the merits of such a program in the future and to correct any identified flaws in any future programs.

I have reviewed the evaluation done of the Grandview program and found it useful in this regard.

Conclusion

I end this Report where it began. Central to the Government's response to reported institutional abuse was a Compensation Program. It was seriously flawed. So flawed that it left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, innocent employees who have been branded as abusers, and a public confused and unenlightened about the extent to which young people were or were not abused while in the care of the Province of Nova Scotia.

I was to determine whether the Government response was appropriate, fair and reasonable. The simple answer is that it was not. It was commendable that the Government was concerned about the plight of abuse victims and understood its obligation to rectify past wrongs and prevent future wrongs. However, it lost sight of its obligation to its own former and current employees. And fairness became yet another victim. And so did the credibility of the Program itself.

As Government recognized – albeit imperfectly – the flaws in its own Program, some changes were introduced. But the changes did not rectify the basic unfairness of the Program and, ironically enough, were at times unfair to those whom the Program was designed to help – the true victims of abuse.

It would be all too easy to find malevolence in a Government response so flawed. No doubt, some affected parties have formed their own conclusions in this regard. But every tragedy does not have a villain. The issues that confronted the Government were not always free from difficulty. Nor was every Government official committed to, or equally responsible for, this flawed Program. The challenge here is to learn from the mistakes made and to avoid their repetition.

I have crafted 105 recommendations – a 'Blueprint for the Future.' This is somewhat of a misnomer, since there is no single blueprint that should dictate how Government should or can respond to reports of institutional abuse. However, I am hopeful that the concerns that motivate my recommendations may find expression in the approaches taken by this and other governments in the future.